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IN THE

Supreme Court of the United States

OCTOBER TERM 1948

No. 38

TRANSCONTINENTAL & WESTERN AIR, INC.,
Petitioner,

against

CIVIL AERONAUTICS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND SUPPORTING BRIEF

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IN THE

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No.

TRANSCONTINENTAL & WESTERN AIR, INC.,

Petitioner,

against

CIVIL AERONAUTICS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS

To the Honorable Fred M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The petitioner, Transcontinental & Western Air, Inc., respectfully shows to this Court:

Statement of the Matter Involved

Petitioner is an air carrier engaged in transporting persons, property and mail by aircraft in the United States and elsewhere under certificates of public convenience and necessity issued to it by the respondent, Civil Aeronautics

Board, under the Civil Aeronautics Act of 1938 as amended (52 Stat. 977 ff., 49 U. S. C. §§401-680).*

Section 406(a)(1) of the Act empowers and directs the Board, upon its own initiative or upon petition of the Postmaster General or an air carrier, "to fix and determine from time to time, after notice and hearing, the fair and reasonable rates of compensation for the transportation of mail by aircraft . . . by each holder of a certificate authorizing the transportation of mail by aircraft, and to make such rates effective from such date as it shall determine to be proper . . ."

1. The Petition for a New Rate

By petition filed March 14, 1947 (8-13) TWA applied to the Board, pursuant to §406 of the Act, for an order fixing and determining fair and reasonable rates of compensation, effective January 1, 1946, for transporting mail by aircraft over certain routes operated by it wholly within the United States, designated as routes nos. 2, 38, 44 and 58. That petition stated, in substance, the following facts.

By order dated October 26, 1945 the Board had fixed a rate of 45¢ per ton mile for carrying mail over TWA's domestic routes. This rate was made effective as of January 1, 1945 (10). TWA lost money in every month after the issuance of that order except June 1946 (9-10). These losses were partly due to a common postwar experience:

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* For brevity, the following abbreviations will be used in this petition and the accompanying brief. Numbers in parentheses refer to the pages of the Transcript of the Record filed herein. The "Act" means the Civil Aeronautics Act of 1938, as amended. The Civil Aeronautics Board and its predecessor, the Civil Aeronautics Authority, will be called "the Board." Petitioner will sometimes be called "TWA."

Unless otherwise stated, all italics are ours.

costs kept rising while mail revenue declined (8). They were largely caused, however, by conditions peculiar to TWA.

TWA first received new 4-engine Constellation aircraft in September 1945 (8). Because of certain controversies, these airplanes were not placed in service until February 1946 (8-9). By June 1946 enough Constellations were in operation to enable TWA to report a net profit for that one month (9).

On July 11, 1946, however, all Constellations were suddenly grounded by the Administrator of Civil Aeronautics (9). This grounding was beyond TWA's control. No other domestic airline then had Constellations in operation (9). Because of the grounding, all of TWA's Constellations were out of revenue service until the middle of September 1946, and many for even longer (9). Meanwhile virtually all TWA's costs continued (9). Instead of enjoying anticipated profits from summer operations, TWA suffered serious losses (9).

That blow was hardly over when, on October 21, 1946, TWA's operations were completely shut down by a strike of its pilots (9). The pilots had demanded higher wages. A Board appointed by the President of the United States recommended an increased pay scale. TWA promptly put this recommendation into effect (9). Nonetheless the pilots served an ultimatum demanding an even higher wage scale within 30 hours (9). If TWA had granted the pilots' demand, its costs would have been even higher (9). The strike then ensued. The shutdown following the strike continued for almost four weeks and caused further severe financial losses (9).

The petition alleged that the old 45¢ rate had not been fair and reasonable since January 1, 1946 (10) and, pursuant to §406(c) of the Act, proposed a new rate (11).

2. The Procedure Below

On May 27, 1947, Public Counsel of the Board moved that the Board, without hearing the merits, dismiss so much of TWA's petition as requested a new mail rate for the period from January 1, 1946 to March 14, 1947, the date the petition was filed. The principal ground of this motion was that "as a matter of sound general policy" the Board should not make such a retroactive adjustment (15).

On June 11, 1947, TWA answered this motion, pointing out that the Board had the duty to hear and consider the merits of any petition involving matters within its jurisdiction (22-25). Thereafter, on June 23, 1947, Public Counsel amended their motion to dismiss by adding a new ground: that the Board had "no authority" to adjust a rate retroactively (38). The Postmaster General supported this position (41).

After oral argument (41-60), the Board granted the motion by an order dated December 2, 1947 (91). Dismissal was not on the merits, or in the exercise of discretion, but solely on the ground—advanced by a majority of three members—that the Board lacked power to fix a rate effective before the date the petition was filed (63-90). Member Lee dissented with an opinion (92-108).

On January 30, 1948, TWA duly applied for review of the Board's order by the United States Court of Appeals for the District of Columbia which, on August 2, 1948, affirmed the Board's order with an opinion by Judge Prettyman (111-1[illegible]).

Jurisdictional Statement

This Court has jurisdiction to review the judgment and decree of the United States Court of Appeals for the District of Columbia by virtue of the following statutory provisions: 28 U. S. C. §1254 (see Pub. L. 773, 80th Cong., 2d Sess., ch. 646) and §1006(f) of the Civil Aeronautics Act of 1938 (52 Stat. 1024; 49 U. S. C. §646(f)).

The Questions Presented

1. *Does the Board have power to make a new mail rate effective from a date prior to the initiation of a proceeding to revise an old rate?*

Petitioner argued that the plain language of §406(a)(1), by which the Board is "empowered and directed" to fix fair and reasonable rates of compensation for carrying mail, and "to make such rates effective from such date as it shall determine to be proper" confers upon the Board the power to set a rate effective as of any date which, after a review of all the facts, it determines to be proper, whether or not that date antedates the filing of the petition. (All parties admit that a rate may be made retrospectively effective back to the filing date). Petitioner maintained that this interpretation was supported by the specific language of §406, by the Act's general arrangement and purposes, by the legislative history of the Act and by its administrative construction. The Court of Appeals concluded, however, that the language of §406(a)(1) was insufficient to overcome a supposed "almost conclusive presumption against the power to take retroactive action" and found that the Board lacked the claimed authority.

2. *Is the Act, if interpreted to deny the Board the power to increase a mail rate effective prior to the initiation of a mail rate proceeding, in violation of the Fifth Amendment to the Constitution of the United States?*

Petitioner is required by the Act to transport air mail. Petitioner argued that if the Act were interpreted to deny any power in the Board to fix a new mail rate effective prior to the initiation of a mail rate proceeding, the Act would be unconstitutional because it would deprive petitioner of its property without due process of law, and take such property without just compensation, by compelling it to transport mail even though the rate for such transportation had proved insufficient to afford petitioner just compensation. The Court of Appeals did not specifically pass upon this contention but, by upholding the Board's order, necessarily decided that, even under this interpretation, the Act did not violate the Constitution.

Reasons For the Allowance of the Writ

1. The United States Court of Appeals for the District of Columbia has decided questions of general importance which have not been, but should be, settled by this Court.

2. The United States Court of Appeals for the District of Columbia has decided a question of substance relating to the construction and application of a statute of the United States which has not been, but should be, settled by this Court.

3. The United States Court of Appeals for the District of Columbia has decided a question of substance relating to the construction and application of the Constitution of

the United States which has not been, but should be, settled by this Court.

4. The United States Court of Appeals for the District of Columbia has failed to give proper effect to several applicable decisions of this Court.

These reasons are discussed in petitioner's attached brief.

WHEREFORE your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the United States Court of Appeals for the District of Columbia, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Court of Appeals had in the case numbered and entitled in its Docket No. 9763 (April Term 1948), *Transcontinental & Western Air, Inc., Petitioner* v. *Civil Aeronautics Board, Respondent,* to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the order herein of the said United States Court of Appeals for the District of Columbia be reversed by this Court and for such other, further or different relief as to this Court may seem proper.

Dated, New York, New York, October 29, 1948.

GERALD B. BROPHY,
Counsel for Transcontinental &
Western Air, Inc., Petitioner.

CHADBOURNE, WALLACE, PARKE & WHITESIDE,
of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM 1948

No.

TRANSCONTINENTAL & WESTERN AIR, INC.,

Petitioner,

against

CIVIL AERONAUTICS BOARD,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Opinion of the Court Below

The opinion of the United States Court of Appeals for the District of Columbia has not yet been reported. It appears in the certified copy of the Transcript of Record (111-115). The opinions of the majority and dissenting members of the Board also appear in the Transcript (60-108).

Jurisdiction

Reference is made to the jurisdictional statement in the petition (*supra*, p. 5).

Statement of the Case

Reference is made to the "statement of the matter involved" in the petition (*supra*, p. 1).

Specification of Errors

1. The Court of Appeals erred in holding that the Act does not empower the Board to make a new mail rate effective from a date prior to the initiation of a proceeding to revise a rate previously fixed.

2. The Court of Appeals erred in failing to hold that the Act, and particularly §406(a)(1) thereof, delegates to the Board the power of Congress to revise mail rates retrospectively to any past date determined to be proper.

3. The Court of Appeals erred in holding that the Board's power under the Act was limited by "an almost conclusive presumption against power to take retroactive action," when no such presumption exists.

4. The Court of Appeals erred in holding that §406(a)(1) of the Act should be judicially circumscribed by false analogies to other statutes, which differ completely in language and purpose, and particularly to statutes regulating the rates of public utilities engaged in two-dimensional transit.

5. The Court of Appeals erred in holding that the Board is empowered to change mail rates only prospectively and in failing to hold that the practical considerations which compel public utility rates to be changed only prospectively have no application to mail compensation.

6. The Court of Appeals erred in failing to hold that the Board's previous exercise and acknowledgment of its power to make mail rates effective as of dates prior to the institution of a rate proceeding constituted an administrative interpretation entitled to particular weight in the construction of the Act.

7. The Court of Appeals erred in holding that the legislative history of the Act showed that the provision of §406(a) giving the Board power "to make such rates effective from such date as it shall determine to be proper" was added only for a limited purpose, and that this language should be given such limited effect.

8. The Court of Appeals erred in holding that the Board was not authorized to increase rates effective prior to the initiation of a proceeding because it would therefore necessarily be authorized also to recapture a substantial portion of any excessive profits earned prior thereto.

9. The Court of Appeals erred in failing to hold that if the Act were interpreted to deny the Board any power to increase mail rates, effective from a date prior to initiation of a proceeding to revise an old rate, the Act would violate the Fifth Amendment to the United States Constitution, in that it would deprive petitioner of property without due process of law and take its property without just compensation.

10. The Court of Appeals erred in affirming the order of the Board.

THE IMPORTANCE OF THIS CASE

This case involves a novel issue of interpretation of an important and unique act of Congress. Besides presenting several important legal questions which it would be desirable for this Court to settle, the decision below has grave practical consequences.

The question of the Board's power to adjust mail pay is vital to the entire air transport industry. Apart from its effect on future proceedings, the decision below affects at least six other current proceedings—one of which is already on appeal—in which the problems involved here have already been raised.* It is peculiarly important to resolve those problems at this time because the air transportation industry is now in a critical financial condition.

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* *Capital Airlines, Inc.* v. *Civil Aeronautics Board* (Court of Appeals, D. C., Docket No. 9870, under decision) (carrier on January 14, 1947 requested increased mail pay retroactive to June 1, 1942; Board contends that it lacks authority to increase compensation prior to filing date); *United Air Lines, Inc., Mail Rates*, Order No. E-1355, April 7, 1948 (carrier on July 1, 1947 requested increased mail pay retroactive to January 1, 1947; Board held it lacks authority to increase compensation prior to filing date); *Northwest Airlines, Inc., Mail Rates*, Order No. E-1353, April 7, 1948 (carrier on December 8, 1947 requested increased mail pay effective November 1, 1946; Board held that it lacks authority to increase compensation prior to filing date); *American Airlines, Inc., Mail Rates*, Order No. 1351, April 7, 1948 (proceeding instituted by Board order of April 7, 1948; carrier requests compensation retroactive to at least January 1, 1948; Board contends that it lacks authority to increase compensation prior to date of initiation of proceeding); *Delta Air Lines, Inc., Mail Rates*, Order No. E-1959, September 7, 1948 (carrier on September 9, 1947 requested increased mail pay retroactive to September 1, 1946; Board held it lacks authority to increase compensation prior to filing date); *Alaska Airlines, Inc.*, Order No. E-1885, Aug. 13, 1948, see *infra*, p. B3, note *.

At the beginning of 1948 the Air Policy Commission, appointed by President Truman to assist in formulating an integrated national aviation policy, unanimously reported:

> "The air lines, the most important element of civil aviation, are passing through one of the most serious crises of their history. The domestic trunk lines of the country suffered an operating loss of approximately $22,000,000 in the fiscal year ending June 30, 1947.
>
> "This situation is significant for two reasons. If not relieved it will contribute to the rapid deterioration of air-line service to the public. A second reason is now of even greater importance. The air lines have a fleet of aircraft of great value to the military services as a reserve in time of war. As a potential military auxiliary, the air lines must be kept strong and healthy. They are not in such a condition at the present time."*

The President's Air Policy Commission found that while the industry's difficulties resulted from a variety of causes, the over-all situation was the same throughout:

> "The revenue from passengers and cargo, plus a revenue for the carriage of the mail roughly equal to the passenger rate, will not support the operations of many of the companies. If they are to continue in operation and start again up the ladder toward self-sufficiency the Government will have to increase the mail rates" (pp. 100-101).

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* *Survival in the Air Age*, Report by the President's Air Policy Commission (January 1, 1948), p. 99. See also, *National Aviation Policy*, Report of Congressional Aviation Policy Board, 80th Cong., 2d Sess. (March 1, 1948), pp. 1, 16; Civil Aeronautics Board, Annual Report (1947), p. 7.

The President's Commission after pointing out that Congress had, through the Act, adopted a policy of governmental financial aid to the airlines (p. 100), concluded:

> "We consider that direct Government financial aid to commercial air lines is fully justified on grounds of national security and economic welfare. We believe the air transport system of this country can, with such aid now, become self-supporting in the future. We are convinced that any impartial investigators of air transport would endorse the use of public funds to obtain such a sound air transportation system. This means the continued granting of subsidies to air lines for an additional period" (p. 102).

Since the date of the Commission's report, the airlines' situation has, if anything, grown worse. The domestic trunk lines suffered further operating losses approximating $15,500,000 in the twelve months ending June 30, 1948.* The Civil Aeronautics Board has found that TWA and United Air Lines, Inc., two of the nation's largest air carriers, are in "critical financial condition" (*Transcontinental & Western Air, Inc.*, Order No. E-1520, May 7, 1948, p. 1). Two months ago the President found it necessary to ask the Reconstruction Finance Corporation to find suitable means by which the air transport industry can obtain proper financing.** Meanwhile, the need for national preparedness has increased and the airlift program into Berlin has graphically demonstrated the value of transport aviation as a military auxiliary.

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* *American Aviation Daily*, Statistical Supp., Sept. 30, 1947; Apr. 22, 1948; Oct. 14, 1948.

** *American Aviation Daily*, Aug. 12, 1948, p. 232.

The decision below places a formidable obstacle in the path of the industry's recovery. A series of groundings, strikes, crashes and other crises, together with generally increased postwar operating costs, have proven the current "service" mail rates, set in 1944 and 1945 in rather optimistic expectations of future operations, to be woefully inadequate. These rates did not, of course, contemplate the crises which have occurred. Future measures alone may be utterly insufficient to restore the industry's health. When a soldier's strength has been sapped because his prescribed diet has proved too scanty, the Army medical officer does not content himself with increasing his rations in the future. If needed to repair the ravages of past mistakes, plasma is administered promptly, and its quantity is determined by the actual needs of the patient, not by the date on which he reported at sick call. The air transport industry occupies a precisely similar situation. Yet the decision below prevents the Board from remedying inadequacies of its past rate predictions by confining it to future palliatives.* The Board is held impotent to take all necessary measures, irrespective of the urgency of the case and the paramount needs of the national interest. That holding has been reached by a process of strained interpretation and a complete disregard of the principle enunciated by this Court in *Chicago & Southern Airlines, Inc.* v. *Waterman Steamship Corp.*, 333 U. S. 103, 107-108, when discussing this Act that "we see no reason why the efforts of the Congress to foster and regulate development of a revolutionary commerce that operates in three dimensions should be judicially circumscribed with analogies taken over from two-dimensional transit."

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*Whether the petitioner is or is not entitled to relief, on the merits, is not the question here. The merits have not been examined—the Board has been held powerless to examine them.

POINT I

The Act clearly delegates to the Board the power which is now held non-existent.

Determining the compensation for carrying the mails in the future always involves a prophecy. Especially is that true where air transportation is concerned. "In air transportation we can see but dimly the shape of things to come" (*American Airlines, Inc.—Mail Rate Proceeding*, 3 C. A. B. 323, 339). "The determination of a fair rate necessarily includes consideration of the susceptibility of the industry to large and unpredictable fluctuations of net operating income" (*Delta Air Corp.—Mail Rates for Route Nos. 24 and 54*, 3 C. A. B. 261, 285). The Board recently remarked on "the inherent weakness in prophecy as to revenues and expenses" (*Pan American Airways, Inc.*, Order No. E-771, p. 6, Aug. 25, 1947), and emphasized that fact when it set TWA's mail rates in 1945. *Transcontinental & Western Air, Inc., Mail Rates*, 6 C. A. B. 595, 597-598, 600, 601.

Any determination of air mail rates for the future is therefore peculiarly "a forecast subject to all the frailties of prophecy" (*United Air Lines, Inc.* v. *Civil Aeronautics Board*, 81 App. D. C. 89, 95; 155 F. [2d] 169, 175). Events often belie the prophecy. When a rate becomes unfair, revision of the prophecy in light of the actual facts is desirable and, when the carrier is obliged to carry the mail—as here—constitutionally mandatory.

Congress has repeatedly adjusted mail rates retroactively by specific legislation—both downwards* and upwards.** Changing rates by special legislation is, however, a cumbersome and slow process. Adjustment by an administrative agency is flexible and less dilatory. Hence Congress created the Board to take over the burden for it.

Presumably Congress intended to confer sufficiently broad power to enable the Board to cope with all situations that might arise, thus reducing appeals for Congressional relief to a minimum. In fact, by the unique language of §406(a)(1) of the Act—itself a unique statute—Congress clearly delegated to the Board plenary power to correct false prophecies by adjusting mail rates retroactively, irrespective of the filing date of the rate proceeding.

By §406(a)(1) the Board is "empowered and directed" to "make such rates effective from such date as it shall determine to be proper." On its face, this language is perfectly clear. Indeed, in 1943 the Board remarked on "the *plain* language of the statute relative to the Board's dis-

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* See, *e.g., Missouri, Kansas & Texas Ry. Co.* v. *U. S.*, 256 U. S. 610, 614; *Eastern Rd. Co.* v. *U. S.*, 129 U. S. 391, 395; *Jacksonville, Pensacola & Mobile Rd. Co.* v. *U. S.*, 118 U. S. 626; *Wisconsin Central Rd. Co.* v. *U. S.*, 164 U. S. 190; *Chicago, Milwaukee & St. Paul Ry. Co.* v. *U. S.*, 198 U. S. 385.

** See, for instance, Act of July 28, 1916, c. 261, 39 Stat. 425, mentioned in *St. Louis Southwestern Ry. Co.* v. *U. S.*, 262 U. S. 70, 73, footnote 2. See also Act of *August* 14, 1935, c. 530, 49 Stat. 617, §8, providing that compensation for carrying air mail under certain contracts should be paid "on and after *March* 1, 1935 . . . at the rate fixed by order of the Commission," applied in *Air Mail Compensation*, 222 I. C. C. 602, 606; *Air Mail Rate for Route No. 33*, 216 I. C. C. 381, 401-402; *Air Mail Rates for Route No. 8*, 227 I. C. C. 509, 510; *Air Mail Rate for Route No. 2*, 231 I. C. C. 229, 231.

cretionary power to make rates effective from such date as it deems proper" (*American Airlines, Inc. et al., Mail Rates*, 4 C. A. B. 90, 93). In 1947, curiously enough, it found that "ambiguity is clearly present" (68).

More comprehensive words than are found in §406(a)(1) would be hard to imagine. "The language of section 406(a) gives to the Authority [Board] the right to exercise a sound discretion in determining the proper date on which a rate shall be made effective" (*Pan American Airways Co. [of Nevada]—Mail Rates*, 1 C. A. A. 385, 409). No limitations on that discretion are imposed, although of course the Board must regard the statutory objectives. In 1942 the Board stated this forcefully in *American Airlines, Inc.—Mail Rate Proceeding*, 3 C. A. B. 323, 331:

> "We conclude that section 406(a) of the Act vests in the Board *complete discretion* to determine the date upon which its orders thereunder shall become effective. In exercising this discretion, we are limited *only* by the procedural requirements of notice and hearing and by the necessity of promoting the broad objectives of the Act."

It reiterated that conclusion in *American Airlines, Inc. et al., Mail Rates*, 4 C. A. B. 90, 92.

Thus the unwieldy process of petitioning Congress for legislation increasing a rate retroactively has been discarded. Of course the Board is not compelled to make retroactive changes; but it must weigh all the facts of each particular case and select that date which will be proper—whether the day on which its order is issued, a future day, or a past day which may or may not antedate the institution of the rate proceeding. Complete pliability is the essence of the statutory scheme in this respect.

The sweeping scope of §406(a)(1) is illuminated by the contrast with other parts of the Act dealing with public utility rates for carrying passengers and cargo.

All air carriers must file with the Board "tariffs showing all rates, fares and charges for air transportation," under §403(a) of the Act (52 Stat. 992, 49 U. S. C. §483(a)). The carrier may change the rates, but only prospectively. "No change shall be made in any rate, fare, or charge . . . specified in any effective tariff . . . except *after* thirty days' notice of the proposed change . . . The Board may in the public interest . . . allow such change upon notice less than that herein specified . . ." (§403(c) of the Act: 52 Stat. 992, 49 U. S. C. §483(c)). Likewise the Board may review the filed rates and prescribe different ones, but only *in futuro;* for §1002(d) of the Act provides (52 Stat. 1018, 49 U. S. C. §642(d)):

> "Whenever, after notice and hearing . . . the Board shall be of the opinion that any individual or joint rate, fare, or charge demanded, charged, collected or received by any air carrier . . . is or will be unjust or unreasonable . . . the Board shall determine and prescribe the lawful rate, fare, or charge . . . *thereafter* to be demanded, charged, collected or received or the lawful classification, rule, regulation or practice *thereafter* to be made effective . . ."

Similarly, §404(a) of the Act (52 Stat. 993, 49 U. S. C. §484(a)) requires air carriers to "establish just, reasonable, and equitable divisions" of joint passenger and cargo rates "as between air carriers." The Board may "upon complaint or upon its own initiative" investigate "the divisions of joint rates" and "prescribe the just, reasonable, and equitable divisions thereof to be received by the several

air carriers" (§1002(h), 52 Stat. 1020, 49 U. S. C. §642(h)). That section goes on to say:

> "The Board may require the adjustment of divisions between such air carriers *from the date of filing the complaint* or entry of order of investigation, *or such other date subsequent thereto*, as the Board finds to be just, reasonable and equitable."

Thus when Congress wanted to prevent the Board from taking retrospective action, it said so. When it wanted to confer power to take action retrospectively, but only to the time of the filing of a proceeding, it said so. It said nothing of the sort in §406(a)(1). Instead it gave the Board full authority to make mail pay rates "effective from such date"—present, past or future—"as it shall determine to be proper." This marked contrast between §406(a)(1) and the other provisions of the Act was completely ignored below.

Into this simple, flexible statute, the opinion below reads a rigid limitation on the Board's power. A rate may become unfair and confiscatory on one day, but if the rate proceeding does not begin until a week later, the Board is held powerless to remedy the injustice completely by making the new rate effective as of the day when it became confiscatory. It may grant full relief only if, by some fortuitous coincidence, a rate proceeding was pending on that day for some totally different reason.

Thus, on March 1 two airlines may be equally affected by the sudden grounding of airplanes which they both use.*

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* In *Braniff Airways, Inc.*, Order No. E-1931, Sept. 2, 1948, the Board pointed out that "costs attributable to the grounding of aircraft types are neither normal nor recurrent in nature," and "are neither predictable nor capable of actual measurement on a prospective basis" (p. 13).

If a rate proceeding involving airline X happens to be pending on that day, the Board is free to adjust X's mail rates as of March 1, to allow for the increased costs due to the grounding. No rate proceeding involving airline Y, however, may be pending on March 1 and one is not begun until April 1. Although Y's need for increased mail pay may be exactly the same as X's, the Board is now held unable to adjust Y's mail rates back to March 1; it must stop short at April 1, when Y's rate proceeding began.*

The Act contains no such limitation on the Board's power. It has simply been imported into the statute by main force. It is not physically possible for the carrier to act instantly, even when a sudden catastrophe, which is bound to affect rates seriously, occurs. It takes time to prepare even a simple petition, and §406(c) of the Act (52 Stat. 998; 49 U. S. C. 486(c)) requires more than a simple petition. "Any petition for the fixing of fair and reasonable rates of compensation under this section shall include a statement of the rate the petitioner believes to be fair and reasonable." If the carrier is to comply sincerely with §406(c), it cannot possibly file a petition as soon as an emergency occurs. Especially is that so when the calamity is of uncertain duration, such as a strike or the grounding

* Such a situation has actually developed. On November 1, 1947, all DC-6 airplanes were grounded. *American Aviation Daily*, Nov. 12, 1947, p. 210. United Airlines, Inc. and American Airlines, Inc. were both using DC-6 aircraft and received the same mail rate. United had a rate proceeding pending but American had none. The DC-6 airplanes were gradually restored to service between March 11 and June 1, 1948. On April 7, 1948, the Board proposed to increase United's rate back to January 1, 1948. At the same time it instituted a proceeding involving American, proposing to increase American's mail pay, but only as of April 7, 1948, because no proceeding was pending before then. See Orders Nos. E-1351 and E-1355, Apr. 7, 1948. The proceedings are still pending.

airplanes, so that one can only guess whether its effect l pass rapidly or persist indefinitely.

The situation is only aggravated when the unfairness of rate develops imperceptibly, as it usually does. Then s impossible to detect exactly when the fair rate becomes fair. Even after unfairness is suspected, the carrier y reasonably attribute its losses to other causes. With the advantage of knowledge after the event, the Board's empt to fix the time when the rate became unfair will be y an informed guess. Yet the carrier is now told to sh to the Board with a petition whenever it remotely sus- ts that a rate may be unfair, or risk losing part of its t compensation. It delays at its peril if the Board is werless to grant relief when hindsight shows that the e was unfair before the petition was filed. Thus a emium is put on hasty, ill-considered petitions and a nalty imposed on the prudent carrier which files a peti- n only after events have actually shown that its fears re well-founded.

Actually the Board repeatedly exercised the power to viate such untoward consequences which is now disa- wed. Until the decision below, the Board never denied at it had *power* to make mail rates retroactively effective om any date. The most that it stated was that "as a tter of sound *general* policy there should be no adjust- nts in mail rates during periods when a rate case is not nding" (*Braniff Airways, Inc., Mail Rates for Routes s. 9, 15 and 50*, 3 C. A. B. 633, 636).* It would be idle talk of a "general" policy if the Board lacked power vary it.

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* For other similar "policy" statements see *Transcontinental & stern Air, Inc., Mail Rates*, 4 C. A. B. 139, 142-143; *All American iation, Inc., Mail Rate for Route No. 49*, 4 C. A. B. 354, 356-357;

Moreover, time and again the Board both asserted and exercised the power to make rates effective as of a time antedating the institution of a rate proceeding. As the cases are rather lengthy and somewhat technical, they are reviewed in detail in Appendix B hereto. It is significant that, as late as April 18, 1947, the Board's Public Counsel asserted:

> "*Although the Board has the power to fix a rate to be effective prior to the date of the institution of a mail rate proceeding,* it has consistently held as a matter of sound general policy that no adjustments should be made in mail rates during periods when rate proceedings are not pending."*

POINT II

The Court of Appeals relied on a non-existent presumption against a retrospective interpretation.

"In the first place," said the Court of Appeals, "we are met with the almost conclusive presumption against power to take retroactive action unless Congress plainly

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Pacific Alaska Airways, Inc., Alaska Mail Rates, 6 C. A. B. 61, 70; *Caribbean-Atlantic Airlines, Inc., Mail Rate*, 7 C. A. B. 943, 946. In only two cases did the Board specifically leave open the question whether power existed. *Continental Air Lines, Inc.—Mail Rates for Routes Nos. 29 and 43*, 3 C. A. B. 395, 401; *Mid-Continent Airlines, Inc.—Mail Rates for Routes Nos. 26 and 48*, 3 C. A. B. 464, 466.

* Motion of Public Counsel Burt and Redding to dismiss petition for retroactive rate, *Matter of Mail Compensation of Pennsylvania-Central Airlines Corp.*, Docket No. 484.

When Public Counsel originally moved to dismiss TWA's petition, they did *not* claim that the Board had no power to grant it (13-21). It was two months later, after TWA had cited authorities showing that the Board could not abdicate its power by denying a hearing on the merits (22-25), before Public Counsel amended their motion to contend that no such power existed (38). The claim of lack of power was a sheer afterthought.

specifies such power" (112). The court's citation of *Neild* v. *District of Columbia*, 71 App. D. C. 306, 110 F. (2d) 246, shows that it completely misapplied the familiar principle that "unless the contrary plainly appears a statute applies prospectively only" (110 F. [2d], at p. 254).

"Every law that is to have an operation before the making thereof, as to commence at an antecedent time . . . is retrospective" (*Calder* v. *Bull*, 3 Dall. [U. S.] 386, 391). Since "the court will presume that the lawmaking power is acting for the future only and not for the past" (*White* v. *U. S.*, 191 U. S. 545, 552), "laws are not to be considered as applying to cases which arose before their passage unless that intention be clearly declared" (*Shwab* v. *Doyle*, 258 U. S. 529, 534). That is all the presumption against retroactivity means.

A statute is not interpreted retroactively when—as here—it operates only on situations coming into existence after its passage. Moreover, a "statute is not rendered retroactive merely because the facts or requisites upon which its subsequent action depends, or some of them, are drawn from a time antecedent to the enactment" (*Reynolds* v. *U. S.*, 292 U. S. 443, 449). See also, *Cox* v. *Hart*, 260 U. S. 427, 435; *Great Northern Ry. Co.* v. *Sutherland*, 273 U. S. 182, 192; *Lewis* v. *Fidelity & Deposit Co. of Maryland*, 292 U. S. 559, 571; *U. S.* v. *Jacobs*, 306 U. S. 363, 367. Indeed, the *Neild* case actually applied that very principle (110 F. [2d], at p. 255). Hence there can be no "claim of retroactivity" where a statute involves a "recomputation by the state [Board] of taxes [mail pay] under a statute which was existent throughout the whole period in question" (*Illinois Central Rd. Co.* v. *Minnesota*, 309 U. S. 157, 164). *Cf. U. S.* v. *New York Central Rd. Co.*, 279 U. S. 73, 79; *American Airlines, Inc.—Mail Rate Proceeding*, 3 C. A. B. 323, 328.

POINT III

The Court of Appeals relied on a wholly false analogy to public utility rate statutes.

The court relied heavily on a supposed analogy to public utility rate statutes. "The whole" Act, it thought, "is cast in the form of the usual public utility rate-determination measure. Such measures are frequently made effective as of the date of the inauguration of the proceedings, but never, so far as we know, for periods prior thereto" (114). Therefore the unique language of §406(a)(1), which is found in no public utility rate statute, was cut down to mean something less than it says.

Even if the court's major premise—that §406 of the Act is the "usual utility rate-determination measure"—were correct, its conclusion would not follow. "A restrictive interpretation should not be given a statute merely because Congress has chosen to depart from custom" (*U. S.* v. *Sullivan*, 332 U. S. 689, 693). And there were excellent reasons why Congress did not apply public utility rate principles to airmail pay.

1. Carrying the mail is not a public utility function. That was settled long ago. "The company in carrying the mails was not hauling freight, nor was it acting as a common carrier with corresponding rights and liabilities but in this respect it was serving as an agency of government" (*Atchison, Topeka & Santa Fe Ry. Co.* v. *U. S.*, 225 U. S. 640, 649).* That rule reflects vital practical differences

* See also, *U. S.* v. *Hamburg-Amerikanische Packetfahrt Actien Gesellschaft*, 212 Fed. 40, 43 (C. C. A. 2); *Bankers' Mutual Casualty Co.* v. *Minneapolis, St. Paul & S. S. M. Ry. Co.*, 117 Fed. 434, 439 (C. C. A. 8); *U. S.* v. *Atlantic Coast Line R. Co.*, 206 Fed. 190, 194; *United Fruit Co.* v. *U. S.*, 33 F. (2d) 664, 666 (C. C. A. 5).

between a mail carrier and a public utility, which are drawn in this very Act.

As a common carrier of passengers and cargo by air, TWA deals directly with the general public—a large, fluctuating group of passengers and shippers. It collects its charges from each customer individually. Every change in its passenger or freight rates directly hits the pocketbooks of its customers. Retroactive increases of those rates is a practical impossibility, just as a retroactive increase of any other public utility rate is not feasible in practice. Customers keep changing and it would be intolerable to make an individual passenger or shipper of freight pay a higher rate years later even though strictly he was charged too little.

Theoretically a court could say that an electric company, for example, was entitled to collect a higher rate from each of ten thousand persons who had already paid their bills, retroactive to some past day. The increase could hardly be put into effect, however, for "consumers of electricity are constantly changing, and . . . additional charges could scarcely be enforced against those who had not enjoyed the lower rate" (*Springfield Gas & Elec. Co.* v. *Barker*, 231 Fed. 331, 335). That is the very reason why enforcement of a utility rate which *prima facie* is confiscatorily low can be temporarily enjoined. "If the Supreme Court of the State hereafter shall change the rate, even *nunc pro tunc*, the plaintiffs will have no adequate remedy for what they may have lost before the Court shall have acted" (*Oklahoma Natural Gas Co.* v. *Russell*, 261 U. S. 290, 293). See also, *Henderson Water Co.* v. *Corporation Comm. of North Carolina*, 269 U. S. 278, 281.

Because of this practical situation, public utility rates necessarily look to the future. The Act recognizes that

fact. As already seen (pp. 19-20), TWA's air passenger and cargo rates—public utility rates—may be changed only prospectively.

The practical situation is entirely different where mail pay is concerned. As a mail carrier, TWA deals with only one customer—the Government. Compensation for carrying the mail is paid by the Post Office, not by every man who buys an airmail stamp. Changes in mail pay do not directly impinge on any one individual. The Government, as sole customer, never changes its identity; it is always available to bear the cost of retroactive increases, or receive the benefit of retroactive decreases, of mail rates. Retroactive adjustment is practically feasible; as noted above (pp. 17-18), it has frequently been made.

Hence mail pay has never been controlled by the rules peculiar to public utility rates. *U. S. v. Griffin*, 303 U. S. 226, 237-238. Since the reason underlying the traditional public utility rule is inapplicable to mail pay, it is hardly surprising that §406(a)(1) of the Act does not embody that rule, but permits mail pay rates to be changed "effective from such date as" the Board "shall determine to be proper."

The difference in treatment was pointed out on May 1, 1947, by a member of the Board when testifying before the Subcommittee of the Senate Committee on Appropriations, 80th Cong., 1st Session, on H. R. 2436 (Hearings, p. 574):

> "Mr. Ryan. When we fix passengers and cargo rates, those rates are prospective in their operation. They do not relate back.
>
> "Now, of course you can understand the practical reasons for that. Passengers are scattered all over, and their identity is lost.

"Senator Saltonstall. You have only one mail customer.

"Mr. Ryan. That is right. There is just the Postmaster General, and if he overpays as a result of one of our decisions, he will not pay the following year and even up."

2. Moreover, it is quite incorrect to suppose that, where mail pay is concerned, the Act is a traditional regulatory public utility statute. "It must not be forgotten that the Civil Aeronautics Act is fashioned to a developmental as well as a regulatory objective. Nowhere is this fact made clearer than in those provisions which set forth the standards for the Board's guidance in the exercise of its air mail rate-making function" (*Pan American-Grace Airways, Inc.—Mail Rates*, 3 C. A. B. 550, 563). "Certainly, the declaration of policy contained in section 2 differentiates the Act in many important respects from the usual form of public utility regulatory statutes" (*American Export Airlines, Inc.—Certificate of Public Convenience and Necessity*, 2 C. A. B. 16, 30; appeal dismissed *Pan American Airways, Inc.* v. *Civil Aeronautics Board*, 121 F. [2d] 810 [C. C. A. 2]).

Under the Act, mail pay is not determined by "public utility" principles. "This Board in exercising its rate-making functions has never and does not now measure the reasonableness of the rate in terms of a fair return upon the so-called 'fair value' of the property used and useful in the public service" (*American Airlines, Inc., Mail Rate Proceeding*, 3 C. A. B. 770, 788). Section 406(b) prescribes strikingly unique standards for determining mail pay. "In determining the rate in each case, the Board shall take into consideration, among other factors . . . the need of

each such air carrier for compensation for the transportation of mail sufficient to insure the performance of such service, and, together with all other revenue of the air carrier, to enable such air carrier under honest, economical, and efficient management, *to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense*" (52 Stat. 998, 49 U. S. C. §486(b)).*

"Section 406(b), more than any other section of the Civil Aeronautics Act, discloses the basic difference between the dual developmental and regulatory objective of this Act and the regulatory objective of the ordinary statute designed for the control of public utility rates" (*American Airlines, Inc.—Mail Rate Proceeding*, 3 C. A. B. 323, 335). Actually mail pay is "Government subsidy in the form of mail pay" (Annual Report of the Civil Aeronautics Board, 1947, p. 5). "The use of mail payments is a statutory device for the accomplishment of statutory objectives that transcend the interests of the postal service . . . The 'compensation' which the carrier receives thus becomes compensation not only for carrying the mail but for the building up of a system of air transportation which will serve the nation's commerce and security as well" (*American Airlines, Inc., Mail Rate Proceeding*, 3 C. A. B. 323, 335).

"Thus section 406(b) of the Act departs from the customary rate standards" (*American President Lines, Ltd., et al. Petition*, 7 C. A. B. 799, 802 note 9), and the Board's mail pay task differs "fundamentally from that which faces

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* *Cf.* the much more conventional factors which the Board must consider in setting rates for the common carriage of persons and property. §1002(e); 52 Stat. 1019, 49 U. S. C. §642(e).

the public regulatory body in the fixing of rates for the transportation of passengers and property or in fixing the rates for public utility services" (*Pan American Airways Co. [of Delaware]—Mail Rates*, 1 C. A. A. 220, 252-253). See too, *Eastern Air Lines, Inc., Mail Rate Proceeding*, 3 C. A. B. 733, 755. That was made clear in the Board's first mail pay case, *Mid-Continent Airlines, Inc., Mail Rates*, 1 C. A. A. 45 (pp. 54-55):

> "The above factors which the [Board] is directed to take into consideration in fixing and determining fair and reasonable rates under the act, *differ from the tests which*, under the influence of judicial decision during the past 40 years, *have been set up for the guidance of public regulatory bodies in fixing rates for public utilities and common carriers*. . . . Sections 2 and 406, as well as other sections of the Civil Aeronautics Act, disclose the clear intent of Congress that the problems of civil aviation require special treatment."

Since the "problems of civil aviation require special treatment" §406(a)(1) uses special language which does not appear in any other statute. It is doubly fallacious, therefore, to try to define the retroactive power to change mail rates by analogy to public utility rate cases. That fallacy, exposed by the Interstate Commerce Commission long ago (*Air Mail Compensation*, 222 I. C. C. 602, 603), was riddled by the Board when it rejected an argument that, because a case had held that public utility rates could not be reduced retroactively, it could not reduce mail pay retroactively. It said, *American Airlines, Inc.—Mail Rate Proceeding*, 3 C. A. B. 323 (pp. 330-331):

> "*Unlike that case, the instant proceeding does not involve a relationship between a private shipper and*

a common carrier. If it did, then the carrier's argument that the Board may 'retroactively' increase rates apparently has no force in view of the principle that a private shipper, once having paid a published rate, need not concern himself with subsequently having to pay more. On the contrary, *the Postmaster General, unlike the private shipper, is the medium through which continuous financial support necessary for the carriers to fulfill the purposes of the Act is extended. Our obligation is to see to it that the rates he pays are at all times sufficient to enable the carriers to accomplish and maintain those purposes.* Likewise, our obligation is also to see that the rates do not at any time exceed those which are proper under the statute. We must discharge both obligations."

3. The court was led to espouse the false analogy to "public utility" rate cases by its assumption that the only alternative was a "cost-plus" payment in which "the net to the contractor is the same no matter what the quality of the performance may be" (114). "We cannot find in this statute," said the court, "any language which indicates that Congress intended to guarantee to every carrier a profit" (114).

No one claims that Congress intended to "guarantee to every carrier a profit" regardless of the "quality of the performance." As the Board can, must and always does review costs, and is ever alert to allow only reasonable costs in the light of actual experience, this bugaboo is simply imaginary.*

* Section 406(b) refers to the carrier's need for compensation to enable it to carry out the purposes of the Act "under honest, economical, and efficient management".

The Board itself has pointed out several times that the "cost-plus" argument affords no reason for adhering doggedly to a false prophecy when events have proved it wrong. "Although it is not the Board's intention, in rate proceedings involving the fixing of mail rates for past periods, to determine mail rates merely on a cost-plus basis, it must be recognized that the process of fixing rates for a past period" on a retroactive basis "does assure the air carrier substantial protection against unforeseeable contingencies for which a prospective fair and reasonable rate might well have made inadequate allowance" (*Pan American Airways, Inc., Transatlantic Mail Rates*, 8 C. A. B. 267, 291, note 22).* Certainly Congress was amply justified in accepting that view, whether the Board now likes it or not.

In point of fact, whenever the Board raises rates retroactively to the date when the proceeding was begun, necessarily it reviews the airline's actual costs and determines the rate in the light of experience. Indeed, since the airline must receive "just compensation," the Constitution requires that to be done. *U. S.* v. *New York Central Rd. Co.*, 279 U. S. 73. Likewise, when the Board fixes "temporary"

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* See also, *Pan American Airways, Inc., Latin-American and Miami-Leopoldville Services Mail Rates*, Order No. E-738, p. 47 (July 24, 1947); *Alaska Airlines, Inc.*, Order No. E-1665, pp. 40-41 (June 4, 1948). "It has been the practice to provide a somewhat lower rate of return for a past period than for a future period in view of the fact that for a past period the probability of error in estimates of operating results is removed and other operating risks have been realized in substantial part" (*Braniff Airways, Inc.*, Order No. E-1931, p. 29, Sept. 2, 1948). See also, *Chicago & Southern Airlines, Inc.*, Order No. E-1740, p. 29 (July 1, 1948); *Delta Air Lines, Inc.*, Order No. E-1959, p. 20 (Sept. 7, 1948).

rates; as it frequently does, it follows the same procedure when it revises them retroactively.*

4. In short, the dilemma which the court posed is simply non-existent. Its analogy to public utility rate statutes ignores the practical reasons which explain why the Act deliberately differentiates between the Board's power to change public utility rates prospectively and its power to change mail pay rate retrospectively as well as prospectively. It ignores the fact that the air mail provisions of the Act deliberately departed from traditional public utility rate principles. And it ignores the admonition of *Chicago & Southern Airlines, Inc.* v. *Waterman Steamship Corp.*, 333 U. S. 103, where, after noting that all forms of transportation had "common features," this Court said (pp. 107-108):

> "But these resemblances must not blind us to the fact that legally as well as literally, air commerce, whether at home or abroad, soared into a different realm than any that had gone before. . . . However

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* At one time, indeed, the Board declined to set rates on a "tentative basis, subject to change according to future operating results" because that "would, in effect, result in the establishment of a 'cost-plus' system of rate making" (*All American Aviation, Inc., Mail Rate for Route No. 49*, 4 C. A. B. 354, 357). It has long since abandoned that position, and fixes "temporary" rates, which will be revised retroactively, both when dealing with new routes (see, *e.g., Essair, Inc., Temporary Mail Rates*, 6 C. A. B. 687, 690-691; *Transcontinental & Western Air, Inc., Transatlantic Mail Rate*, 7 C. A. B. 421, 423; *Pan American Airways, Inc., Transpacific Mail Rate*, 7 C. A. B. 615, 618) and routes on which "permanent" rates were previously effective (see, *e.g., Pennsylvania-Central Airlines Corp.*, Order No. E-436, April 7, 1947, p. 7; *Chicago & Southern Air Lines, Inc.*, Order No. E-510, May 6, 1947, p. 7; *National Airlines, Inc.*, Order No. E-1271, March 5, 1948, pp. 5-6).

useful parallels with older forms of transit may be in adjudicating private rights, *we see no reason why the efforts of the Congress to foster and regulate development of a revolutionary commerce that operates in three dimensions should be judicially circumscribed with analogies taken over from two-dimensional transit.*"

POINT IV

The Act deliberately removed whatever restrictions may have existed under earlier Mail Pay Statutes.

The court also thought that §406(a)(b) "appears to have been designed to establish in the Board the same powers which had theretofore existed at the Interstate Commerce Commission in respect to railway mail" and it "had never been claimed that the Interstate Commerce Commission had unfettered retroactive power" (113). It found justification for whittling down the Act in the "limited legislative purpose" which it thought was "apparent from the history" (113).

Actually the broad language of §406(a)(1) was designed to remove any limitations on power to adjust mail pay rates under earlier, restrictive statutes. That it was intended to confer plenary authority in this respect is made plain by the only expression of Congress on the point, which appears in the Conference Report on the final bill (H. Rep. No. 2635, 75th Cong., 3d Sess., June 7, 1938).* There it was stated (pp. 71-72):

> "*This section* empowers the Authority [Board] to fix mail rates and sets forth the congressional

* This same report was made to and adopted by the Senate on June 13, 1938; see 83 Cong. Rec. 8961-8963.

> policy to guide the Authority [Board] in fixing such rates and *enables the Authority* [Board] *to adjust rates so that the policy of Congress may be properly carried out in the case of each carrier or class of carriers according to the needs of the particular case*. . . . These provisions appear in the conference agreement as section 406(a), (b) and (c)."

Yet the decision below holds that, even though "the needs of the particular case" require that the Board "adjust rates" retrospectively, in order for the airline to carry out "the policy of Congress," the Board is powerless to achieve that beneficent result.

A. The Railway Mail Pay Act of 1916

"Translation of an implication drawn from the special aspects of one statute to a totally different statute is treacherous business" (*Federal Trade Comm.* v. *Bunte Brothers, Inc.*, 312 U. S. 349, 353). This warning is especially pertinent when comparing the Civil Aeronautics Act with the Railway Mail Pay Act of 1916 (Act of July 28, 1916, c. 261; 39 Stat. 425 ff., 39 U. S. C. §524 ff.), and the Air Mail Acts of 1934 and 1935 (Act of June 12, 1934, c. 466; 48 Stat. 933, amended by Act of August 14, 1935, c. 530; 49 Stat. 614), modelled on it. A detailed comparison of the statutes appears in Appendix A hereto.

"The Railway Mail Pay Act terminated the system theretofore prevailing of service under voluntary contracts" (*U. S.* v. *Griffin*, 303 U. S. 226, 229). Under it the railroads were "entitled to receive fair and reasonable compensation" (39 U. S. C. §541). This compensation was fixed purely on a *quantum meruit* basis. *U. S.* v. *Griffin*, 303 U. S. 226, 237. [Under the Civil Aeronautics Act, air-

lines are not paid for transporting mail on any such restrictive basis.]

Railroad mail rates were fixed by the Interstate Commerce Commission. Once fixed, they remain in effect until changed. The Commission was "to fix and determine from time to time the fair and reasonable rates and compensation for the transportation of such mail matter . . . and to publish the same, and *orders so made and published shall continue in force until changed by the Commission* after due notice and hearing" (39 U. S. C. §542). [The difference between this language and §406(a)(1) of the Civil Aeronautics Act is obvious.] There was no provision for a judicial review; the statute permitted only "administrative review by 'reexamination' of an order" (*U. S. v. Griffin*, 303 U. S. 226, 231). [The Civil Aeronautics Act contains in §1006(a), 49 U. S. C. §646(a), an express provision for judicial review.]

An order could not be reexamined until it had remained in effect six months. "Either the Postmaster General or any such carrier may at any time *after the lapse of six months from the entry of the order assailed apply for a reexamination* and thereupon substantially similar proceedings shall be had with respect to the rate or rates for service covered by said applications . . ." (39 U. S. C. §553). [No comparable provision appears in the Civil Aeronautics Act.]

Plainly reexamination was to be purely prospective. In view of the highly restrictive language of the Railway Mail Pay Act, it would hardly be surprising if no power ever existed thereunder to increase mail pay retroactively. Yet this Court held that power to increase the rate retroactively to the date of the petition for reexamination existed

y "reasonable implication," although it was "quite aware hat minutiae of expression may be found that show Congress to have been thinking of the future" (Holmes, J., in *U. S.* v. *New York Central Rd. Co.*, 279 U. S. 73, 79).* "This onclusion was reached despite the fact that the applicable tatute contained no express authority, such as is contained n section 406(a) of the Civil Aeronautics Act, to determine he date on which rate orders should become effective" *American Airlines, Inc.—Mail Rate Proceeding*, 3 C. A. B. 23, 326-327).

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* No issue existed in the *New York Central* case whether mail ay could be increased to a date earlier than the application for reexamination; the court "assumed" that "while the railroads perform hese services and accept pay without protest they get no ground for ubsequent complaint" (p. 78). The problem actually arose in *Macon, Dublin & Savannah Rd. Co.* v. *U. S.*, 78 C. Cl. 251. There he Commission found that plaintiff and other short-line railroads, hich filed petitions for reexamination in May *1931*, were actually separately operated" as of July 3, *1930*, but it refused to award additional compensation for services rendered prior to the filing f their applications with us" (*Railway Mail Pay*, 185 I. C. C. 715, 20). Plaintiff sued in the Court of Claims for the additional pay rom July 3, 1930, to May 1931. A demurrer to its complaint was verruled. "Congress reposed in the Commission the primary duty f determining just compensation, not whether by some act on the art of the carrier it was estopped as a matter of law from receiving ust compensation in its entirety" (78 C. Cl., at p. 256). The period f underpayment without protest was not "so protracted as to estabsh, affirmatively, with all the other circumstances, including the fact hat plaintiff was not free to decline performance, the defense of cquiescence" (p. 258). Final judgment was later given for plainff, 79 C. Cl. 298. While the case primarily involved the question hether plaintiff was entitled to one previously determined rate rather han another, it shows that under the Railway Mail Pay Act—despite s severely restrictive language—it was possible for a railroad to btain an increase in mail pay retroactive to a time antedating its etition for reexamination.

B. The Air Mail Act of 1934

This statute was even more restrictive than the Railway Mail Pay Act on which it was based. Airlines were not compelled by law to carry mail. They assumed that obligation only by making contracts with the Postmaster General (§3(a), 48 Stat. 933-934), which could be terminated "by the contractor at its option upon sixty days' notice" (§6(c), 48 Stat. 935). The rates were negotiated by the contracts, which were let by competitive bidding, subject to a specified ceiling (§3(a), 48 Stat. 934). Contracts were to be "subject to any *reduction* in the rate of payment therefor" (§6(c), 48 Stat. 935).

The Commission was authorized to fix by order "rates of compensation for the transportation of air mail by airplane . . . but not in excess of the rates provided for in this Act . . . and to publish the same, *which shall continue in force until changed by the said Commission* after due notice and hearing" (§6(a), 48 Stat. 935). The limited procedure under the Railway Mail Pay Act for reexamination of a rate after six months was taken over by a section making applicable the whole procedure "for the adjustment of rates for carriage of mail by railroads" (§6(d), 48 Stat. 935). In fact, a special requirement was imposed that rates be reviewed annually "in order to be assured that no unreasonable profit is resulting or accruing" (§6(b), 48 Stat. 935).

Thus Congress' whole effort was to keep air mail pay as low as possible.* Indeed, it took elaborate reasoning

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* Mail pay was determined only by "the amount of air mail so carried, the facilities supplied by the carrier, and its revenue and profits from all sources" (§6(e), 48 Stat. 936). This provision was amended in 1935 to require the Commission to disregard losses resulting from the unprofitable maintenance of non-mail schedules

to establish that the Commission had *any* power to increase the contract rates. *Air-Mail Compensation*, 206 I. C. C. 675, 688-694. Yet despite the statute's manifold restrictions the Commission repeatedly held that it could increase air mail rates retroactively to the date of the application for reexamination.*

In two cases, airlines sought to have rate increases made effective earlier than the time of their applications for adjustment. The requests were denied, but on the merits, not for lack of power.** In one case, however, the Commission

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(49 Stat. 616). The Commission was directed to "keep the aggregate cost of the transportation of air mail on and after July 1, 1938, within the limits of the anticipated postal revenue therefrom" (§6(e), 48 Stat. 936).

* Commissioner Mahaffie dissented because he thought that the rule to this effect under the Railway Mail Pay Act was inapplicable since airlines, unlike railroads, were not obliged to carry the mail. *Air Mail Compensation*, 216 I. C. C. 166, 192; *Air Mail Compensation*, 222 I. C. C. 602, 610; *Air Mail Rates for American Airlines, Inc.*, 225 I. C. C. 12, 46; *Air Mail Rates for Braniff Airways, Inc.*, 226 I. C. C. 752, 768; *Air Mail Rates for Route No. 8*, 227 I. C. C. 509, 516; *Air Mail Rates for Route No. 26*, 229 I. C. C. 373, 383; *Air Mail Rates for Route No. 29*, 229 I. C. C. 623, 632; *Air Mail Rates for Route No. 2*, 231 I. C. C. 229, 250; *Air Mail Rates for Route No. 13*, 231 I. C. C. 673, 683.

** "As previously stated, petitioner seeks to have the findings herein made effective from May 1, 1936, prior to the date its petition was filed. In *Air-Mail Compensation*, 216 I. C. C. 166, the rates found fair and reasonable for routes nos. 3 and 16 were, for the reasons there stated, made applicable from the date of filing of the petition. *This record affords no basis for any different conclusion*, especially, in view of the fact that the relief sought will, in part at least, be obtained through the proper application of the order in *Air Mail Compensation, supra*, during the period prior to the date of filing the petition" (*National Parks Airways—Base Rate Mileage*, 220 I. C. C. 149, 154).

". . . there is no indication *on this record* that any modification of the base rate formerly determined and fixed as fair and reasonable is warranted" (*Boston-Maine Airways, Inc., Base Rate Mileage*, 229 I. C. C. 343, 350).

actually made such a retroactive increase on its own motion.* Moreover, rates were decreased retroactively to a day antedating the rate review proceeding.**

C. The Changes Made by the Civil Aeronautics Act

The Civil Aeronautics Act of 1938 completely revolutionized the status of the airlines and the nature of mail pay. Congress recognized that air carriers subserved national interests of far greater importance than cheap postal service, and that air mail pay was a means of developing an infant industry to effectuate those interests. Hence in §2 Congress enunciated a "new national policy" to foster "the continued development of an air transportation system adequate to the paramount national needs, not only of the postal service but also of our commerce and our national

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*In *Air Mail Compensation*, 232 I. C. C. 608, the Commission eliminated on its own motion a proviso in an earlier order, made two years before, which had reduced air mail pay retroactively. Elimination of the proviso necessarily increased the airlines' compensation retroactively. "We have authority on our own motion to correct an error in our former findings and to make such finding in the form of an amendment to our original findings and order", (p. 613). In *Air Mail Rate for Route No. 33*, 216 I. C. C. 381, 401-402, the Commission made an initial rate retroactive to March 1, 1935, although the rate proceeding was begun thereafter. It did so because of the August 1935 amendment, *supra*, page 38, note *.

**The Commission consistently reviewed operations for periods antedating the proceeding for revision. See, *e.g.*, *Wyoming Air Service, Inc., Rate Review*, 225 I. C. C. 1; *Western Air Express Corp., Rate Review*, 225 I. C. C. 743; *National Airways, Inc., Rate Review*, 226 I. C. C. 409; *Hanford Airlines, Inc.*, 227 I. C. C. 593. In only two cases, however, did it actually lower previous rates. In both of them the decrease was adjusted by the Postmaster General retroactively to March 1, 1935, although the changes were made by proceedings started thereafter. The cases are described in *American Airlines, Inc., Mail Rate Proceeding*, 3 C. A. B. 323, 327 note 12.

defense" (*Chicago & Southern Air Lines, Inc.—Mail Rates for Routes Nos. 8 and 53*, 3 C. A. B. 161, 191).

No longer were airlines free to carry mail or not as they saw fit. They were compelled to carry the mails, §401(m) (52 Stat. 990, 49 U. S. C. §481(m)); 902(a) (52 Stat. 1015, 49 U. S. C. §622(a)), and necessarily were afforded just compensation as a matter of right. §§401(m) and 406(a).

Provisions designed to hold mail pay as low as possible, so that it would not exceed postal revenue, disappeared. The voluntary contract system—under which airlines would bid nominal rates in order to obtain certificates to operate*—was abolished. Ceilings on maximum rates were eliminated. Mail pay was not to be computed on a narrow *quantum meruit* basis, but was to be ample enough to enable the airlines to "maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense" (§406(b)). The mail provisions of the Act "enacted the policy of governmental financial aid to the air lines."**

Likewise the "rate making" procedure under the earlier acts was completely overhauled. Congress struck out the provision that rates remained in effect until changed. It dropped the requirement that six months had to elapse before mail rates could be "reexamined." The newly-created Board was "empowered" to adjust rates at all times, §406(a).

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* See, *e.g.*, *Transcontinental & Western Air Mail Bid*, 223 I. C. C. 281, involving a bid to carry mail at 4 *mills* per airplane mile.

** *Survival in the Air Age*, Report of the President's Air Policy Commission, Jan. 1, 1948, p. 100.

Nor was Congress content to leave the "development of air transportation" to the voluntary action of the airlines. The Board was not to be a passive umpire between the Post Office and the airlines, sitting with folded hands until it was petitioned to act. Congress did not allow the Board "to rest upon the assumption that so long as the carrier interposes no objection to an existing rate, the situation requires no particular relief" (87). By §406(a)(1) Congress not only "empowered" but "directed" the Board to take action "upon its own initiative." It placed on the Board the independent responsibility of effectuating its purposes, stated in §2 and §406(b), whether the carrier acted or not. "Our *obligation* is to see to it that the rates he [the Postmaster General] pays are *at all times* sufficient to enable the carriers to accomplish and maintain those purposes" (*American Airlines, Inc.—Mail Rate Proceeding*, 3 C. A. B. 323, 330). By the same token, it gave the Board full power to effectuate those purposes when the carrier did act.

Congress swept away whatever restrictions may have existed under earlier laws to hamper the retroactive increasing of mail pay. Limitations on the power to make retroactive rate increases might be appropriate in statutes primarily concerned with keeping the cost of postal operations low. They would only defeat the broad national objectives of the new Act. ". . . when Congress wants to give wide discretion it uses broad language" (*Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U. S. 607, 616). In §406(a)(1) it conferred the widest discretion by using the broadest possible words. The Board was "empowered and directed . . . to make such rates effective from such date as it shall determine to be proper."

D. The "Legislative History" of Section 406(a)(1)

The only valid legislative history of Section 406(a)(1) is contained in the Conference Report issued 16 days before the Act was approved.* The "make effective" language of 406(a)(1) was suggested in 1937 during hearings on a bill which was not enacted into law. The witness who proposed it, Mr. Gorrell, representing the Air Transport Association, told a Senate subcommittee: "the present authority of the Commission to fix appropriately the effective date of its rate decisions is . . . specifically preserved."** This sentence was relied on by the Board (74-76) and the court below (113) as proof that the Act should be construed to permit retroactive increases only to the date of the filing of a rate application. The contention is groundless.

The major issue at the time was whether air transportation should be regulated by the Post Office, the Interstate Commerce Commission or an entirely new agency. Under the Air Mail Acts, both the Post Office and the Commission had "authority over the compensation to be paid for the transportation of air mail."*** The Department of Commerce had jurisdiction over safety matters. It was generally agreed that one body should have control of the industry, but there was no agreement on the identity of that agency. The bill under consideration in 1937 would have reposed control in the Commission, and modified then existing law in a great many other respects.

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* See pp. 31-35 *supra*.

** Hearings before the Subcommittee of Senate Interstate Commerce Committee on S. 2 and S. 1760, 75th Cong., 1st Sess., p. 325. This document is referred to hereafter as "Subcommittee Hearings." See also Hearings before House Committee on Interstate and Foreign Commerce on H. R. 5234 and H. R. 4652, 75th Cong., 1st Sess., p. 408.

*** *Subcommittee Hearings*, pp. 40, 42.

The Post Office Department felt that control should rest largely with it.* Therefore it and its champion, Senator McKellar, vigorously opposed the proposed bill, and proceeded to attack the Commission's administration of existing law on a wide front.** In the course of the ensuing argument, the question arose whether the Commission was justified under the existing Air Mail Acts in granting any retroactive rate increases.

On that subject, there had been some difference of opinion in the Commission. Commissioner Mahaffie had held out against retrospective increases, differentiating the rule under the Railway Mail Pay Act on the ground that, unlike that statute, the Air Mail Acts imposed no obligation to carry the mails. His views never prevailed in the Commission and the Post Office never tried to sustain them by a court test.*** Nonetheless, they were aired by the Post

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* *Ibid.*, pp. 107 ff.

** For example, the Commission was charged with being too liberal in increasing air mail pay, and too reluctant to reduce it (*ibid.*, pp. 116, 122, 160-161). A list was submitted showing that rates had been raised on most routes, and decreased or left unchanged on relatively few (pp. 129-135); it showed that in a proceeding instituted on July 22, 1935, the Commission "increased the bid rate . . . retroactively to March 1, 1935" (p. 130). So also, the Commission was charged with not making a proper investigation and audit before increasing rates and not disclosing the evidence on which it based its findings (*ibid.*, pp. 163, 172-174), of employing a man "unduly friendly to the air-mail companies" (p. 167), and of differentiating unduly between the "subsidy" rates given to competing airlines (pp. 169-170).

*** The Act, like the bill which was the subject of discussion in 1937, completely cut the ground from under Mr. Mahaffie's argument, for it imposed on airlines the duty to carry the mails. Even if the "make effective" language of §406(a)(1) had never been added, therefore, unquestionably the Board would have had at least the same power in this respect which the Commission in fact exercised in 1937.

Office in response to questions by Senator McKellar. "On what possible theory or what possible claim of law," he inquired, "were retroactive rates established?"* He elicited testimony from a witness sharing his views that increases were granted retroactively "even further than the application."** Repeatedly he tried to show that the Commission had no "right to make their acts retroactive in fixing rates."***

The proponent of the bill, Senator McCarran, countered this broad attack. He endeavored to show that this court had sustained "retroactive rate decisions."**** 'In other words, that establishes the principle of the propriety of a retroactive decision."***** Testimony was elicited to show that Congress itself had authorized rates to be made retroactive to March 1, 1935.****** Later Mr. Gorrell discussed at length "the power of the Interstate Commerce Commission to make a retroactive award" and vigorously contended that it existed.*******

Manifestly, when Mr. Gorrell said, in proposing the "make effective" language which now appears in §406(a)-(1), that the "present authority of the Commission to fix appropriately the effective date of its rate decisions is like-

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* Hearings, p. 179.

** *Ibid.* He brought out that the Commission went back to "different dates. The first date the payments were adjusted was to March 1, 1935, I believe. In the last case they were fixed back to the date of the filing of the petition."

*** *Ibid.*, pp. 239, 291.

**** *Ibid.*, p. 180.

***** *Ibid.*, p. 343.

****** *Ibid.*, p. 230.

******* *Ibid.*, pp. 483-484.

wise specifically preserved," he was addressing himself to the broad question raised by Senator McKellar—did the Commission have *any* authority to grant retrospective increases? The whole debate was over the "principle of the propriety of a retroactive decision." There is not the slightest reason to suppose that Mr. Gorrell thought that authority to "fix *appropriately* the effective date of its rate decisions" was limited by the date of the start of the rate proceeding.* Neither he nor anyone else addressed himself to that narrower question.**

Nor is there anything to show that Congress, when it passed the Act in the summer of 1938, saw in § 406(a)(1) those subtle nuances now attributed to Mr. Gorrell when he testified in the spring of 1937. It took the language at its broad face value. (See Conference Report, *supra*, pp. 34-35.) "The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction" (*Gemsco, Inc.* v. *Walling*, 324 U. S. 244, 260). No member of Congress ever referred to Gorrell's testimony. "The interpretation of statutes cannot safely

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* As already seen, p. 39, note **, and p. 40, notes * and **, *supra*, rates had been changed retrospectively back of the date of the proceeding, and that fact had been developed in the hearings.

** *Cf. American Stevedores, Inc.* v. *Porello*, 330 U. S. 446. There the question was whether a statute permitted suit for personal injuries as well as injury to property. The Representative proposing the bill stated that it "simply allows suits in admiralty to be brought by owners of vessels whose property has been damaged" and that "where a man's property is damaged, he can bring a suit." He said nothing about suits for personal injuries. This Court disregarded these remarks. "These statements were not, however, answers to questions whether the Act would provide a remedy for injury to the person as well as to property, nor does it appear that the speaker was at the time attentive to such possible distinctions" (p. 452).

be made to rest upon mute intermediate legislative maneuvers" (*Trailmobile Co.* v. *Whirls*, 331 U. S. 40, 61).

Had Congress wished to codify such power as existed under the Railway Mail Pay Act, it had only to copy its words and impose on airlines, like the railroads, the obligation to carry the mails. Instead it changed the words of the earlier acts radically by patently broader language. If it had wanted to confine the Board's power to adjust mail pay by the filing date of the rate proceeding, all it had to do was to copy the language used in other parts of the Act (*supra*, pp. 19-20). It did nothing of the sort.

The legislative history of the Act only confirms the fact that §406(a)(1) means just what it says. Congress deliberately departed from the wording of earlier, restrictive legislation. Drawing a unique statute, it used in §406(a)(1) unique language of a breadth consonant with its broad purpose to foster the development of commercial aviation "until it reaches such stature in passenger and cargo capacity as to constitute in crises an adequate logistical air arm of the National Defense Establishment" (*Report of the Congressional Aviation Policy Board*, p. 5—March 1, 1948). That language should not be whittled down by a construction which ignores these objectives.

POINT V

The decision below thwarts the basic policies of the Act and defeats the airlines' constitutional right to just compensation.

1. The court below was largely influenced by the "result which would ensue if the statute were given unlimited retroactive effect" (114). "No rate order would be final"

(114). But no one suggests that the Board should examine rates "back to 1938" (81), or that it is required to re-examine rates based on facts which it has once reviewed. It does have full power to examine rates based on prophecies which have been belied by facts which have never been reviewed.

That power, the court thought, necessarily implied the power to redetermine rates for past periods "when the carrier has made more than an adequate profit" (114). There is nothing inevitable about that implication. It is one thing to give an airline a fair amount for past services rendered at a rate which events have proved unduly low. It is utterly different to subject it to liability to return money which it has disbursed by a "dividend declaration," or on the faith of which it has entered into a "large commitment" or issued an "offering of securities" or otherwise changed its position (115).

Because of compelling economic and policy considerations, the Board has declined to exercise retroactive power with respect to overpayments. *Pan American-Grace Airways, Inc.—Mail Rates*, 3 C. A. B. 550, 565; *Pan American Airways, Inc., et al., Latin-American Rate Case*, 3 C. A. B. 657, 669; *Eastern Air Lines, Inc., Mail Rate Proceeding*, 3 C. A. B. 733, 743; *American Airlines, Inc., Mail Rate Proceeding*, 3 C. A. B. 770, 776. The *power* is not rendered nonexistent, however, because conceivably it might be abused—in which case doubtless the Board's action would be reversed on appeal. And we see no compelling reason to deny that the Board has power in appropriate cases to declare that excessive amounts have been paid for carrying

the mails, however rarely it should exercise that power as a matter of sound discretion.*

2. The Board's basic complaint was that "until a petition is filed by the carrier we have no notice that an existing rate is regarded as unsatisfactory, and we thus have no opportunity to take" appropriate action (87). Apart from the fact that the Board is directed to act on its own initiative, lack of notice would be no reason for denying that power exists to take complete remedial action when the situation *is* called to the Board's notice. Besides, there are compelling constitutional and statutory reasons why §406(a)(1) should not be vitiated by any such considerations of administrative convenience.

(a) "Rules of comity or convenience must give way to constitutional rights" (*Oklahoma Natural Gas Co.* v. *Russell*, 261 U. S. 290, 293). Section 406(a)(1) was not enacted to serve the Board's convenience. It was essential to save the Act from unconstitutionality. As the airlines were compelled to carry the mails, of course they were entitled to just compensation.**

The Board says that "a rate is constitutionally adequate if it affords a carrier an *opportunity* to earn a fair return"

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* Historically the Government has been able to recover past over-payments of mail pay, no matter "how long a time elapsed before the error in making the overpayment was discovered or how long the attempt to recover it was deferred" (*Grand Trunk Western Ry. Co.* v. *U. S.*, 252 U. S. 112, 121). See also, *U. S.* v. *Carr*, 122 U. S. 644; *Wisconsin Central Rd. Co.* v. *U. S.*, 164 U. S. 190.

** The opinion below states that only the question of power was raised below (112). That is incorrect; the question of constitutionality was also raised in both TWA's main and reply briefs.

(88).* That is true only when the rate is initially set—when it is in the prophecy stage. When it ceases to be adequate in fact, it ceases to be constitutionally adequate, as *U. S.* v. *New York Central Rd. Co.*, 279 U. S. 73, shows.

A confiscatory rate does not cease to be confiscatory because it takes time for the Board, or the airline affected, fully to appreciate the fact. Indeed, we have already seen (pp. 21-22) that it is impossible for an airline to file its petition immediately even when it knows the facts. Hence, unless the Board has the power claimed, a part of the airlines' constitutional rights is left unprotected. Plainly such an interpretation of the Act should not be reached. *U. S.* v. *New York Central Rd. Co.*, 279 U. S. 73, 79.**

(b) The purposes of the Act, moreover, transcend considerations of administrative convenience. Congress imposed on the Board the "obligation . . . to see to it that the rates" paid by the Postmaster General "are *at all times* sufficient to enable the carriers to accomplish and

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* The Board relied on public utility cases (69-70). In theory exactly the same principle applies to public utility rates. *Oklahoma Natural Gas Co.* v. *Russell*, 261 U. S. 290, 293. Manifestly, however, it would be unjust to impose the burden of past losses on those future customers of the utility who did not receive the benefit of the unduly low past rates. And, as already seen, for practical reasons public utility rates cannot be retroactively increased when experience proves them to be inadequate. Hence there is no way to effect such a retroactive increase in the case of public utilities. "The Constitution as a continuously operating charter of government does not demand the impossible or the impractical" (*Hirabayashi* v. *U. S.*, 320 U. S. 81, 104; *Bowles* v. *Willingham*, 321 U. S. 503, 515).

** Undoubtedly constitutional rights can be waived. But failure to file a petition for an increase in rates is not a waiver as a matter of law. See *Macon, Dublin & Savannah Rd. Co.* v. *U. S.*, 78 C. Cl. 254, *supra*, p. 37, note *; *Alaska Airlines, Inc.*, Order No. E-1885 (Aug. 13, 1948).

maintain those purposes" (*American Airlines, Inc.—Mail Rate Proceeding*, 3 C. A. B. 323, 330). It regarded the fostering of a strong commercial aviation industry as vital to national defense and polity. Mail pay was the device used by the airlines in fulfilling that purpose.

A carrier cannot properly attain that legislative goal when its financial strength has been impaired because events have belied the Board's rate prophecies. The Board must be able to afford the full relief needed to make good the impairment. We submit that the Act confers on the Board full power to effectuate the purposes of Congress, and that the result below flies in the face of the clear words of the statute.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: New York, N. Y., October 29, 1948.

APPENDIX A

Relevant Statutory Provisions

Railway Mail Pay Act of 1916 39 Stat. 425, 39 U. S. C. §§ 524-579	Air Mail Acts of 1934 and 1935 48 Stat. 933, 49 Stat. 616	Civil Aeronautics Act of 1938 52 Stat. 977, 49 U. S. C. §§ 401-691
	Declaration of Policy	
None	None	DECLARATION OF POLICY Sec. 2 (52 Stat. 980, 49 U. S. C. §402) In the exercise and performance of its powers and duties under this Act, the Authority shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity— (a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense; (b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

Railway Mail Pay Act of 1916
39 Stat. 425, 39 U. S. C. §§ 524-579

Air Mail Acts of 1934 and 1935
48 Stat. 933, 49 Stat. 616

Civil Aeronautics Act of 1938
52 Stat. 977, 49 U. S. C. §§ 401-691

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The regulation of air commerce in such manner as to best promote its development and safety; and

(f) The encouragement and development of civil aeronautics.

Carrier's Statutory Duty to Carry Mail

Sec. 5, subd. 27 (39 Stat. 429, 39 U. S. C. §541) All railway common carriers are hereby required to transport such mail matter as may be offered for transportation by the United States in the manner, under the conditions, and with the service prescribed by the Postmaster General and shall be entitled to receive fair and reasonable compensation for such transportation and for the service connected therewith.	None	REQUIREMENT AS TO CARRIAGE OF MAIL Sec. 401(m) (52 Stat. 999, 49 U. S. C. §481 (m)) Whenever so authorized by the certificate, any air carrier shall provide necessary and adequate facilities and service for the transportation of mail, and shall transport mail whenever required by the Postmaster General. Such air carrier shall be entitled to receive reasonable compensation therefor as hereinafter provided.

Sec. 5, subd. 33 (39 Stat. 431, 39 U. S. C. §563) It shall be unlawful for any railroad company to refuse to perform mail service at the rates or methods of compensation provided by law when required by the Postmaster General to do so, and for such offense shall be fined $1,000. Each day of refusal shall constitute a separate offense.

APPLICATION FOR ABANDONMENT

Sec. 401(k) (52 Stat. 990, 49 U. S. C. §481(k)) No air carrier shall abandon any route, or part thereof, for which a certificate has been issued by the Authority, unless, upon the application of such air carrier, after notice and hearing, the Authority shall find such abandonment to be in the public interest. Any interested person may file with the Authority a protest or memorandum of opposition to or in support of any such abandonment. The Authority may, by regulations or otherwise, authorize such temporary suspension of service as may be in the public interest.

TENDER OF MAIL

Sec. 405(g) (52 Stat. 995, 49 U. S. C. §485(g)) From and after the issuance of any certificate authorizing the transportation of mail by aircraft, the Postmaster General shall tender mail to the holder

thereof, to the extent required by the Postal Service, for transportation between the points named in such certificate for the transportation of mail, and such mail shall be transported by the air carrier holding such certificate in accordance with such rules, regulations, and requirements as may be promulgated by the Postmaster General under this section.

SAFETY AND POSTAL OFFENSES

SEC. 901(a) (52 Stat. 1015, 49 U. S. C. 621 (a)) Any person who violates (1) any provision of titles V, VI, and VII of this Act, or any provision of subsection (a) (1) of section 11 of the Air Commerce Act of 1926, as amended, or (2) any rule or regulation issued by the Postmaster General under this Act, shall be subject to a civil penalty of not to exceed $1,000 for each such violation. Any such penalty may be compromised by the Authority or the Postmaster General, as the case may be. The amount of such penalty, when finally determined, or the amount agreed upon in compromise, may be deducted from any sums owing by the United States to

CRIMINAL PENALTIES—GENERAL

SEC. 902(a) (52 Stat. 1015, 49 U. S. C. §622(a)) Any person who knowingly and willfully violates any provision of this Act (except titles V, VI, and VII), or any order, rule, or regulation issued under any such provision or any term, condition, or limitation of any certificate or permit issued under title IV, for which no penalty is otherwise herein provided, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be subject for the first

of 1926, as amended, or (2) any rule or regulation issued by the Postmaster General under this Act, shall be subject to a civil penalty of not to exceed $1,000 for each such violation. Any such penalty may be compromised by the Authority or the Postmaster General, as the case may be. The amount of such penalty, when finally determined, or the amount agreed upon in compromise, may be deducted from any sums owing by the United States to the person charged.

CRIMINAL PENALTIES—GENERAL

Sec. 902(a). (52 Stat. 1015, 49 U. S. C. §622(a)) Any person who knowingly and willfully violates any provision of this Act (except titles V, VI, and VII), or any order, rule, or regulation issued under any such provision or any term, condition, or limitation of any certificate or permit issued under title IV, for which no penalty is otherwise herein provided, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be subject for the first offense to a fine of not more than $500, and for any subsequent offense to a fine of not more than $2,000. If such violation is a continuing one, each day of such violation shall constitute a separate offense.

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Authorization to Award Mail Contracts

Sec. 5, subd. 10 (39 Stat. 427, 39 U. S. C. §565). The Postmaster General is authorized to make special contracts with the railroad companies for the transportation of the mails where in his judgment the conditions warrant the application of higher rates than those herein specified, and make report to Congress of all cases where such special

Sec. 3(a) (48 Stat. 933) The Postmaster General is authorized to award contracts for the transportation of air mail by airplane between such points as he may designate, and for initial periods of not exceeding one year,* to the lowest

[No authorization to award new contracts except "in the event of emergency caused by flood, fire or other calamitous visitation." Sec. 405(k) (52 Stat. 997, 49 U. S. C. §485(k)).]

* Words "one year" changed to "three years" by amendment of August 14, 1935 (49 Stat. 616).

contracts are made and the terms and reasons therefor.

responsible bidders tendering sufficient guaranty for faithful performance in accordance with the terms of the advertisement at fixed rates per airplane-mile: *Provided*, That where the Postmaster General holds that a low bidder is not responsible or qualified under this Act, such bidder shall have the right to appeal to the Comptroller General who shall speedily determine the issue, and his decision shall be final: *Provided further*, That the base rate of pay which may be bid and accepted in awarding such contracts shall in no case exceed 33-1/3 cents per airplane-mile for transporting a mail load not exceeding three hundred pounds. Payment for transportation shall be at the base rate fixed in the contract for the first three hundred pounds of mail or fraction thereof plus one tenth of such base rate for each additional one hundred pounds of mail or fraction thereof, computed at the end of each calendar month on the basis of the average mail load carried per mile over the route during such month, except that in no case shall payment exceed 40 cents per airplane-mile.

Sec. 3(g) (48 Stat. 934) Author-

Postmaster General to provide and pay for the carriage of mail by air in conformity with the terms of any contract let by him prior to the passage of this Act, or which may be let pursuant to a call for competitive bids therefor issued prior to the passage of this act and to extend any such contract for an additional period or periods not exceeding nine months in the aggregate at a rate of compensation not exceeding that established by this Act

	the contract for the first three hundred pounds of mail or fraction thereof plus one tenth of such base rate for each additional one hundred pounds of mail or fraction thereof, computed at the end of each calendar month on the basis of the average mail load carried per mile over the route during such month, except that in no case shall payment exceed 40 cents per airplane-mile.	
	Sec. 3(g) (48 Stat. 934) Authority is hereby conferred upon the Postmaster General to provide and pay for the carriage of mail by air in conformity with the terms of any contract let by him prior to the passage of this Act, or which may be let pursuant to a call for competitive bids therefor issued prior to the passage of this act and to extend any such contract for an additional period or periods not exceeding nine months in the aggregate at a rate of compensation not exceeding that established by this Act nor that provided for in the original contract: *Provided*: that no such contract may be so extended unless the contractor shall agree in writing to comply with all the provisions of this Act during the extended period of the contract.	
	Termination of Mail Contracts	
None	Sec. 6(c) (48 Stat. 935) Any contract which may hereafter be let or extended pursuant to the provisions of this Act, and which has been satisfactorily performed by the contractor during its initial or extended period, shall thereafter be continued in effect for an indefinite period, subject to any reduction in the rate of payment therefor, and such additional conditions and terms, as the [Interstate Com-	None.[Contracts entered into under the Air Mail Act canceled upon the issuance of a certificate of convenience and necessity authorizing mail transportation. Sec. 405 (52 Stat. 994, 49 U. S. C. §485(a)).]

Railway Mail Pay Act of 1916
39 Stat. 425, 39 U. S. C. §§ 524-579

Sec. 5 subd. 28 (39 Stat. 429, 39 U. S. C. §542) The Interstate Commerce Commission is hereby empowered and directed to fix and determine from time to time the fair and reasonable rates and compensation for the transportation of such mail matter by railway common carriers and the service connected therewith, prescribing the method or methods by weight, or space, or both, or otherwise, for ascertaining such rate or compensation; and to publish the same, and orders so made and published shall continue in force until changed by the commission after due notice and hearing.

Sec. 5, subd. 30(g) (39 Stat. 430, 39 U. S. C. 551) At the conclusion of the hearing the Commission shall establish by order a fair, reasonable

Air Mail Acts of 1934 and 1935
48 Stat. 933, 49 Stat. 616

merce] Commission may prescribe, which shall be consistent with the requirements of this Act; but any contract so continued in effect may be terminated by the said Commission upon sixty days' notice, upon such hearing and notice thereof to interested parties as the Commission may determine to be reasonable; and may also be terminated by the contractor at its option upon sixty days' notice. On the termination of any air-mail contract, in accordance with any of the provisions of this Act, the Postmaster General may let a new contract for air-mail service over the route affected, as authorized in this Act.

Power to Fix Rates From an Effective Date

Sec. 6 (a) (48 Stat. 935) The Interstate Commerce Commission is hereby empowered and directed, after notice and hearing, to fix and determine by order, as soon as practicable and from time to time, the fair and reasonable rates of compensation [within the limitations of this Act]* for the transportation of air mail by aircraft and the service connected therewith over each air-mail route, [but not in excess of the rates provided for in this Act,]† [and over each section thereof covered by a separate contract,]* prescribing the method or methods by weight or space, or both, or otherwise, for ascertaining such rates of compensation, and to publish the same, which shall continue in force until changed by the said Commission after due notice and hearing, [and so much of subsection

Civil Aeronautics Act of 1938
52 Stat. 977, 49 U. S. C. §§ 401-691

AUTHORITY TO FIX RATES

Sec. 406 (a) (52 Stat. 998, 49 U. S. C. §486 (a) The Authority is empowered and directed, upon its own initiative or upon petition of the Postmaster General or an air carrier, (1) to fix and determine from time to time, after notice and hearing, the fair and reasonable rates of compensation for the transportation of mail by aircraft, the facilities used and useful therefor, and the services connected therewith (including the transportation of mail by an air carrier by other means than aircraft whenever such transportation is incidental to the transportation of mail by aircraft or is made necessary by conditions of emergency arising from aircraft operation), by each holder of a certificate authorizing the transporta-

Power to Fix Rates From an Effective Date

Sec. 5 subd. 28 (39 Stat. 429, 39 U. S. C. §542) The Interstate Commerce Commission is hereby empowered and directed to fix and determine from time to time the fair and reasonable rates and compensation for the transportation of such mail matter by railway common carriers and the service connected therewith, prescribing the method or methods by weight, or space, or both, or otherwise, for ascertaining such rate or compensation, and to publish the same, and orders so made and published shall continue in force until changed by the commission after due notice and hearing.

Sec. 5, subd. 30(g) (39 Stat. 430, 39 U. S. C. §551) At the conclusion of the hearing the Commission shall establish by order a fair, reasonable rate or compensation to be received, at such stated times as may be named in the order, for the transportation of mail matter and the service connected therewith, and during the continuance of the order the Postmaster General shall pay the carrier from the appropriation for inland transportation by railroad routes such rate or compensation.

Sec. 6 (a) (48 Stat. 935) The Interstate Commerce Commission is hereby empowered and directed, after notice and hearing, to fix and determine by order, as soon as practicable and from time to time, the fair and reasonable rates of compensation [within the limitations of this Act]* for the transportation of air mail by airplane and the service connected therewith over each air-mail route, [but not in excess of the rates provided for in this Act,]† [and over each section thereof covered by a separate contract,]* prescribing the method or methods by weight or space, or both, or otherwise, for ascertaining such rates of compensation, and to publish the same, which shall continue in force until changed by the said Commission after due notice and hearing, [and so much of subsection (g) of section 3 of this Act as is in conflict with this section is repealed.]*

* Bracketed words added by amendment of August 14, 1935 (49 Stat. 616).

† Bracketed words deleted by amendment of August 14, 1935 (49 Stat. 616).

AUTHORITY TO FIX RATES

Sec. 406 (a) (52 Stat. 998, 49 U. S. C. §486 (a) The Authority is empowered and directed, upon its own initiative or upon petition of the Postmaster General or an air carrier, (1) to fix and determine from time to time, after notice and hearing, the fair and reasonable rates of compensation for the transportation of mail by aircraft, the facilities used and useful therefor, and the services connected therewith (including the transportation of mail by an air carrier by other means than aircraft whenever such transportation is incidental to the transportation of mail by aircraft or is made necessary by conditions of emergency arising from aircraft operation), by each holder of a certificate authorizing the transportation of mail by aircraft, and to make such rates effective from such date as it shall determine to be proper; (2) to prescribe the method or methods, by aircraft-mile, pound-mile, weight, space, or any combination thereof, or otherwise, for ascertaining such rates of compensation for each air carrier or class of air carriers; and (3) to publish the same; and the rates so fixed and determined shall be paid by the Postmaster General from appropriations for the transportation of mail by aircraft.

Express Power to Make Retroactive Adjustments in Specific Situations

Sec. 3 (39 Stat. 425) That on account of the increased weight of mails resulting from Postmaster

Sec. 6(c) (49 Stat. 617) Any contract (1) let, extended, or assigned pursuant to the provisions of this

See Section 406(a)(1) (*supra*, pp. A8-A9).

General's order numbered seventy-seven hundred and twenty, of December eighteenth, nineteen hundred and thirteen, respecting rates upon and limit of weight of parcel-post packages, effective from January first, nineteen hundred and fourteen, the Postmaster General is authorized to add to the compensation paid for transportation on railroad routes on and after January first, nineteen hundred and fourteen, for the remainder of the contract terms, not exceeding one per centum thereof per annum.

Sec. 4 (39 Stat. 425) That on account of the increased weight of mails resulting from Postmaster General's order numbered seventy-three hundred and forty-nine, of July twenty-fifth, nineteen hundred and thirteen, respecting rates upon the limit of weight of parcel-post packages in the local, first, and second zones, and effective from August fifteenth, nineteen hundred and thirteen, the Postmaster General is authorized to add to the compensation paid for transportation on railroad routes on and after August fifteenth, nineteen hundred and thirteen, for the remainder of the contract terms, not exceeding one-half of one per centum thereof per annum."

Sec. 5, Subd. 1 (39 Stat. 425). That the Postmaster General is authorized and directed to readjust the compensation to be paid to railroad companies from and after the thirtieth day of June, nineteen hundred and sixteen, or as soon thereafter as may be practicable, for the transportation and handling of the mails

Act, and in full force and effect on March 1, 1935, or (2) which may be let subsequent to such date pursuant to the provisions of this Act and shall have been satisfactorily performed by the contractor during its full initial period, shall, from and after such date, or from and after the termination of its initial period, as the case may be, be continued in effect for an indefinite period, and compensation therefor, on and after March 1, 1935, during such period of indefinite continuance, shall be paid at the rate fixed by order of the Commission under this Act, subject to such additional conditions and terms as the Commission may prescribe, upon recommendation of the Postmaster General, which shall be consistent with the requirements and limitations contained in section 1 of this Act; but any contract so continued in effect may be terminated by the Commission upon sixty days' notice, upon such hearing and notice thereof to interested parties as the Commission may determine to be reasonable; and may also be terminated, in whole or in part, by mutual agreement of the Postmaster General and the contractor, or for cause by the contractor upon sixty days' notice.

Above provision added by amendment of August 14, 1935, superseding first sentence of Sec. 6(c) set forth above under "Termination of Mail Contracts".

mails resulting from Postmaster General's order numbered seventy-three hundred and forty-nine, of July twenty-fifth, nineteen hundred and thirteen, respecting rates upon the limit of weight of parcel-post packages in the local, first, and second zones, and effective from August fifteenth, nineteen hundred and thirteen, the Postmaster General is authorized to add to the compensation paid for transportation on railroad routes on and after August fifteenth, nineteen hundred and thir-

tract terms, not exceeding one half of one per centum thereof per annum."

Sec. 5, Subd. 1 (39 Stat. 425) That the Postmaster General is authorized and directed to readjust the compensation to be paid to railroad companies from and after the thirtieth day of June, nineteen hundred and sixteen, or as soon thereafter as may be practicable, for the transportation and handling of the mails and furnishing facilities and services in connection therewith upon the conditions and at the rates hereinafter provided.

Sec. 5, Subd. 39 (39 Stat. 429) Pending the decision of the Interstate Commerce Commission, as hereinafter provided for, the existing method and rates of railway mail pay shall remain in effect, except on such routes or systems as the Postmaster General shall select, and to the extent he may find it practicable and necessary to place upon the space system of pay in the manner and at the rates provided in this section, with the consent and approval of the Interstate Commerce Commission, in order to properly present to the Interstate Commerce Commission the matters hereinafter referred thereto: *Provided*, That if the final decision of

mission may prescribe, upon recommendation of the Postmaster General, which shall be consistent with the requirements and limitations contained in section 1 of this Act; but any contract so continued in effect may be terminated by the Commission upon sixty days' notice, upon such hearing and notice thereof to interested parties as the Commission may determine to be reasonable; and may also be terminated, in whole or in part, by mutual agreement of the Postmaster General and the contractor, or for

cause by the contractor upon sixty days' notice.

Above provision added by amendment of August 14, 1935, superseding first sentence of Sec. 6(c) set forth above under "Termination of Mail Contracts".

Railway Mail Pay Act of 1916
39 Stat. 425, 39 U. S. C. §§ 524-579

the Interstate Commerce Commission shall be adverse to the space system, and if the rates established by it under whatever method or system is adopted shall be greater or less than the rates under this section, the Postmaster General shall readjust the compensation of the carriers on such selected routes and systems in accordance therewith, from the dates on which the rates named in this section became effective.

Factors to be Considered in Setting Rates

Sec. 5, subd. 29 (39 Stat. 429, 39 U. S. C. (543). In fixing and determining the fair and reasonable rates for such service the commission shall consider the relation existing between the railroads as public-service corporations and the Government, and the nature of such service as distinguished, if there be a distinction, from the ordinary transportation business of the railroads.

Sec. 5, subd. 30(i). (39 Stat. 430, 39 U. S. C. (554). For the purposes of [the Railway Mail Pay Act] the Interstate Commerce Commission is hereby vested with all the powers which it is authorized by law to exercise in the investigation and ascertainment of the justness and reasonableness of freight, passenger, and express rates to be paid by private shippers.

Air Mail Acts of 1934 and 1935
48 Stat. 933, 49 Stat. 616

Factors to be Considered in Setting Rates

Sec. 6(e) (48 Stat. 936) In fixing and determining the fair and reasonable rates of compensation for air-mail transportation, the Commission shall give consideration to the amount of air mail so carried, the facilities supplied by the carrier, and its revenue and profits from all sources, and from a consideration of these and other material elements, shall fix and establish rates for each route which, in connection with the rates fixed by it for all other routes, shall be designed to keep the aggregate cost of the transportation of air mail on and after July 1, 1938, within the limits of the anticipated postal revenue therefrom. [In arriving at such determination the Commission shall disregard losses resulting, in the opinion of the Commission, from the unprofitable maintenance of non-mail schedules, in cases where the Commission may find that the gross receipts from such schedules fail to meet the additional operating expense occasioned thereby. In fixing and determining such rates, if it

Civil Aeronautics Act of 1938
52 Stat. 977, 49 U. S. C. §§ 401-691

Rate-Making Elements

Sec. 406(b) (52 Stat. 998, 49 U. S. C. 486(b)). In fixing and determining fair and reasonable rates of compensation under this section, the Authority, considering the conditions peculiar to transportation by aircraft and to the particular air carrier or class of air carriers, may fix different rates for different air carriers or classes of air carriers, and different classes of service. In determining the rate in each case, the Authority shall take into consideration, among other factors, the condition that such air carriers may hold and operate under certificates authorizing the carriage of mail only by providing necessary and adequate facilities and service for the transportation of mail; such standards respecting the character and quality of service to be rendered by air carriers as may be prescribed by or pursuant to law; and the need of each such air carrier for compensation for the transportation of mail sufficient to insure the per-

rates for such service the commission shall consider the relation existing between the railroads as public-service corporations and the Government, and the nature of such service as distinguished, if there be a distinction, from the ordinary transportation business of the railroads.

Sec. 5, subd. 30(i) (39 Stat. 430, 39 U. S. C. 554). For the purposes of [the Railway Mail Pay Act] the Interstate Commerce Commission is hereby vested with all the powers which it is authorized by law to exercise in the investigation and ascertainment of the justness and reasonableness of freight, passenger, and express rates to be paid by private shippers.

air-mail transportation, the Commission shall give consideration to the amount of air mail so carried, the facilities supplied by the carrier, and its revenue and profits from all sources, and from a consideration of these and other material elements, shall fix and establish rates for each route which, in connection with the rates fixed by it for all other routes, shall be designed to keep the aggregate cost of the transportation of air mail on and after July 1, 1938, within the limits of the anticipated postal revenue therefrom. [In arriving at such determination the Commission shall disregard losses resulting, in the opinion of the Commission, from the unprofitable maintenance of non-mail schedules, in cases where the Commission may find that the gross receipts from such schedules fail to meet the additional operating expense occasioned thereby. In fixing and determining such rates, if it shall be contended or alleged by the holder of an air-mail contract that the rate of compensation in force for the service involved is insufficient, the burden of establishing such insufficiency and the extent thereof shall be assumed by him. In no case shall the rates fixed and determined by the said Commission hereunder exceed the limits prescribed in section 3(a) of this Act.]*

* Bracketed words added by amendment of August 14, 1935 (49 Stat. 616).

U. S. C. 486(b)). In fixing and determining fair and reasonable rates of compensation under this section, the Authority, considering the conditions peculiar to transportation by aircraft and to the particular air carrier or class of air carriers, may fix different rates for different air carriers or classes of air carriers, and different classes of service. In determining the rate in each case, the Authority shall take into consideration, among other factors, the condition that such air carriers may hold and operate under certificates authorizing the carriage of mail only by providing necessary and adequate facilities and service for the transportation of mail; such standards respecting the character and quality of service to be rendered by air carriers as may be prescribed by or pursuant to law; and the need of each such air carrier for compensation for the transportation of mail sufficient to insure the performance of such service, and, together with all other revenue of the air carrier, to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense.

PENDING ADMINISTRATIVE PROCEEDINGS

Sec. 1108(b) (52 Stat. 1029, 49 U. S. C. §678(b)) The provisions of this Act shall not affect any proceedings pending before the Secretary of Commerce or the Postmaster General, or proceedings pending before the Interstate Com-

Railway Mail Pay Act of 1916 39 Stat. 425, 39 U. S. C. §§ 524-579	Air Mail Acts of 1934 and 1935 48 Stat. 933, 49 Stat. 616	Civil Aeronautics Act of 1938 52 Stat. 977, 49 U. S. C. §§ 401-691
		merce Commission for the determination of rates for the transportation of air mail by aircraft, on the date of the enactment of this Act; but any such proceedings shall be continued, orders therein issued, appeals therefrom taken, and payments made by the Postmaster General pursuant to such orders, as if this Act had not been enacted; and orders issued in any such proceeding shall continue in effect until modified, terminated, superseded, or repealed by the Authority or by operation of law: *Provided*, That the rates determined by the Interstate Commerce Commission shall be determined without regard to that portion of section 6(e) of the Air Mail Act approved June 12, 1934, which provides as follows: "which, in connection with the rates fixed by it for all other routes, shall be designed to keep the aggregate cost of the transportation of air mail on and after July 1, 1938, within the limits of the anticipated postal revenue therefrom".
	Duty to Re-examine Effective Rates	
Sec. 5, subd. 30(h) (39 Stat. 425) (39 U. S. C. 565a) Either the Postmaster General or any such carrier may at any time after the lapse of six months from the entry of the order assailed apply for a reexamination and thereupon substantially similar proceedings shall be had with respect to the rate or rates covered by said application, provided said carrier or carriers have an interest therein.	Sec. 6(d) (48 Stat. 935) All provisions of section 5 of the Act of July 28, 1916 (39 Stat. 412; U. S. C., title 39, secs. 523 to 568, inclusive), relating to the administrative methods and procedure for the adjustment of rates for carriage of mail by railroads shall be applicable to the ascertainment of rates for the transportation of air mail by airplane under this Act so far as consistent with the provisions of this Act.	No specific provision.

		State Commerce Commission shall be determined without regard to that portion of section 6(e) of the Air Mail Act approved June 12, 1934, which provides as follows: "which, in connection with the rates fixed by it for all other routes, shall be designed to keep the aggregate cost of the transportation of air mail on and after July 1, 1938, within the limits of the anticipated postal revenue therefrom".
	Duty to Re-examine Effective Rates	
Sec. 5, subd. 30(h) (39 Stat. 425) (39 U. S. C. §553) Either the Postmaster General or any such carrier may at any time after the lapse of six months from the entry of the order assailed apply for a reexamination and thereupon substantially similar proceedings shall be had with respect to the rate or rates covered by said application, provided said carrier or carriers have an interest therein.	Sec. 6(d) (48 Stat. 935) All provisions of section 5 of the Act of July 28, 1916 (39 Stat. 412; U. S. C., title 39, secs. 523 to 568, inclusive), relating to the administrative methods and procedure for the adjustment of rates for carriage of mail by railroads shall be applicable to the ascertainment of rates for the transportation of air mail by airplane under this Act so far as consistent with the provisions of this Act. Sec. 6(b) (48 Stat. 935, as amended 49 Stat. 617) The Interstate Commerce Commission is hereby directed at least once in each calendar year from the date of the award of any contract to examine the books, accounts, contracts and entire business records of the holder of each air-mail contract, and to review the rates of compensation being paid to such holder in order to be assured that no unreasonable profit is being derived or accruing therefrom, and in order to fix just rates. In determining what may constitute an unreasonable profit the said Commission shall take into consideration the income derived from the operation of airplanes over the routes affected, and in addition to the requirements of sections 3(f) of this Act, shall take into consideration all forms of expenditures of said companies in or-	No specific provision.

der to ascertain whether or not the expenditures have been upon a fair and reasonable basis on the part of said company and whether or not the said company has paid more than a fair and reasonable market value for the purchase or rent of planes, engines, or any other types or kind, or class, or goods, or services, including spare parts of all kinds, and whether or not the air-mail contracting company has purchased or rented any kind of goods, commodities, or services from any individuals who own stock in or are connected with the said contracting companies or has purchased such goods and services from any company or corporations in which any of the individuals employed by or owning stock in the air-mail contracting company have any interest or from which such purchases or rents any of the employees or stockholders of air-mail contracting companies would be directly or indirectly benefited. Within thirty days after a decision has been reached upon such review by the Interstate Commerce Commission touching such profit a full report thereof shall be made to the Postmaster General, to the Secretary of the United States Senate, and to the Clerk of the House of Representatives.

Requirement That Carrier Estimate Fair Rate

STATEMENT OF POSTMASTER GENERAL AND CARRIER

Sec. 406(e) (52 Stat. 998, 49 U. S. C. §486(e)). Any petition for the fixing of fair and reasonable

companies or has purchased such goods and services from any company or corporations in which any of the individuals employed by or owning stock in the air-mail contracting company have any interest or from which such purchases or rents any of the employees or stockholders of air-mail contracting companies would be directly or indirectly benefited. Within thirty days after a decision has been reached upon such review by the Interstate Commerce Commission touching such profit a full report thereof shall be made to the Postmaster General, to the Secretary of the United States Senate, and to the Clerk of the House of Representatives.

Requirement That Carrier Estimate Fair Rate

None

None

STATEMENT OF POSTMASTER GENERAL AND CARRIER

Sec. 406(c) (52 Stat. 998, 49 U. S. C. §486(c)). Any petition for the fixing of fair and reasonable rates of compensation under this section shall include a statement of the rate the petitioner believes to be fair and reasonable. The Postmaster General shall introduce as part of the record in all proceedings under this section a comprehensive statement of all service to be required of the air carrier and such other information in his possession as may be deemed by the Authority to be material to the inquiry.

Judicial Review of Rate Orders

None [See *United States* v. *Griffin*, 303 U. S. 226.]

None

ORDERS OF AUTHORITY SUBJECT TO REVIEW

Sec. 1006(a) (52 Stat. 1024, 49 U. S. C. §646) Any order, affirmative or negative, issued by the Authority under this Act, except any order in respect of any foreign air

carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the circuit courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

VENUE

(b) A petition under this section shall be filed in the court for the circuit wherein the petitioner resides or has his principal place of business or in the United States Court of Appeals for the District of Columbia.

NOTICE OF AUTHORITY; FILING OF TRANSCRIPT

(c) A copy of the petition shall, upon filing, be forthwith transmitted to the Authority by the clerk of the court; and the Authority shall thereupon certify and file in the court a transcript of the record, if any, upon which the order complained of was entered.

POWER OF COURT

(d) Upon transmittal of the petition to the Authority, the court shall have exclusive jurisdiction to affirm, modify, or set aside the order complained of, in whole or in part, and if need be, to order fur-

(b) A petition under this section shall be filed in the court for the circuit wherein the petitioner resides or has his principal place of business or in the United States Court of Appeals for the District of Columbia.

NOTICE OF AUTHORITY; FILING OF TRANSCRIPT

(c) A copy of the petition shall, upon filing, be forthwith transmitted to the Authority by the clerk of the court; and the Authority shall thereupon certify and file in the court a transcript of the record, if any, upon which the order complained of was entered.

POWER OF COURT

(d) Upon transmittal of the petition to the Authority, the court shall have exclusive jurisdiction to affirm, modify, or set aside the order complained of, in whole or in part, and if need be, to order further proceedings by the Authority. Upon good cause shown, interlocutory relief may be granted by stay of the order or by such mandatory or other relief as may be appropriate: *Provided,* That no interlocutory relief may be granted except upon at least five days' notice to the Authority.

FINDINGS OF FACT BY AUTHORITY CONCLUSIVE

(e) The findings of facts by the Authority, if supported by substantial evidence, shall be conclusive. No objection to an order of the Authority shall be considered by the court unless such objection shall have been urged before the Authority or, if it was not so urged, unless there were reasonable grounds for failure to do so.

Railway Mail Pay Act of 1916
39 Stat. 425, 39 U. S. C. §§ 524-579

Air Mail Acts of 1934 and 1935
48 Stat. 933, 49 Stat. 616

Civil Aeronautics Act of 1938
52 Stat. 977, 49 U. S. C. §§ 401-691

CERTIFICATION OR CERTIORARI

(f) The judgment and decree of the court affirming, modifying, or setting aside any such order of the Authority shall be subject only to review by the Supreme Court of the United States upon certification or certiorari as provided in sections 239 and 240 of the Judicial Code.

NOTE: The Authority is now known as the Board.

Other Relevant Provisions of the Civil Aeronautics Act

Notice of Tariff Change

Sec. 403(c) (52 Stat. 993, 49 U. S. C. 483(c)). No change shall be made in any rate, fare, or charge, or any classification, rule, regulation or practice affecting such rate, fare or charge or the value of the service thereunder specified in any effective tariff of any air carrier or foreign air carrier, except after thirty days' notice of the proposed change filed, posted, and published in accordance with subsection (a) of this section. Such notice shall plainly state the change proposed to be made and the time such change will take effect. The Authority may in the public interest, by regulation or otherwise, allow such change upon notice less than that herein specified, or modify the requirements of this section with respect to filing and posting of tariffs, either in particular instances or by general order applicable to special or peculiar circumstances or conditions.

Power to Prescribe Rates and Practices of Air Carriers

Sec. 1002(d) (52 Stat. 1018, 49 U. S. C. 642(d)). Whenever, after notice and hearing, upon complaint, or upon its own initiative, the Authority shall be of the opinion that any individual or joint rate, fare, or charge demanded, charged, collected or received by any air carrier for interstate or overseas air transportation, or any classification, rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service thereunder, is or will be unjust or unreasonable or unjustly discriminatory, or unduly preferential, or unduly prejudicial, the Authority shall determine and prescribe the lawful rate, fare, or charge (or

the maximum or minimum, or the maximum and minimum thereof) thereafter to be demanded, charged, collected, or received, or the lawful classification, rule, regulation or practice thereafter to be made effective: *Provided,* That as to rates, fares, and charges for overseas air transportation, the Authority shall determine and prescribe only a just and reasonable maximum or minimum or maximum and minimum rate, fare, or charge.

RULE OF RATE MAKING

Sec. 1002(e) (52 Stat. 1018, 49 U. S. C. §642(e)). In exercising and performing its powers and duties with respect to the determination of rates for the carriage of persons or property, the Authority shall take into consideration, among other factors—

(1) The effect of such rates upon the movement of traffic;

(2) The need in the public interest of adequate and efficient transportation of persons and property by air carriers at the lowest cost consistent with the furnishing of such service;

(3) Such standards respecting the character and quality of service to be rendered by air carriers as may be prescribed by or pursuant to law;

(4) The inherent advantages of transportation by aircraft; and

(5) The need of each air carrier for revenue sufficient to enable such air carrier, under honest, economical, and efficient management, to provide adequate and efficient air carrier service.

Power to Prescribe Divisions of Rates

Sec. 1002(h) (52 Stat. 1018, 49 U.S.C. (642(h)). Whenever, after notice and hearing, upon complaint or upon its own initiative, the Authority is of the opinion that the divisions of joint rates, fares, or charges for air transportation are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the air carriers or foreign air carriers parties thereto, the Authority shall prescribe the just, reasonable, and equitable divisions thereof to be received by the several air carriers. The Authority may require the adjustment of divisions between such air carriers from the date of filing the complaint or entry of order of investigation, or such other date subsequent thereto as the Authority finds to be just, reasonable, and equitable.

APPENDIX B

The Board's previous exercise of power to set rates retroactively as of a date prior to the institution of a rate proceeding.

In this Appendix we shall review the proceedings in which the Board has recognized or exercised the power to change rates retrospectively to a date prior to the institution of a rate proceeding.*

A. The New Route Cases

Occasionally an airline has begun operating a new route without filing a rate petition. In such cases the Board has gone back of the date when the petition was filed and made its final rate retroactive to the time when operations started. *All American Aviation, Inc., Mail Rate for Route No. 49*, 3 C. A. B. 79 (route operated 4 months before proceeding begun); *United Air Lines Transport Corp., Mail Rate for Route No. 57*, 3 C. A. B. 381 (route operated 9 days before proceeding begun); *Pacific Alaska Airways, Inc., et al., Alaska Mail Rates*, 6 C. A. B. 61 (route operated 54 days before proceeding begun); *Caribbean-Atlantic Airlines,*

* Of course a "temporary" rate is frequently increased retroactively to a date prior to the institution of the proceeding brought to change that rate. See, *e.g., Northwest Airlines, Inc.*, Order No. E-721, July 29, 1947; *Florida Airways, Inc.*, Order No. E-765, Aug. 19, 1947; *Monarch Air Lines, Inc.*, Order No. E-898, Oct. 20, 1947; *Empire Air Lines, Inc.*, Order No. E-896, Oct. 20, 1947; *Florida Airways, Inc.*, Order No. E-897, Oct. 20, 1947; *Southwest Airways Co.*, Order No. E-899, Oct. 20, 1947; *Chicago & Southern Air Lines, Inc.*, Order No. E-1096, Jan. 5, 1948. In its opinion last adjusting TWA's domestic rates, the Board said it was establishing a "tentative rate" (*Transcontinental & Western Air, Inc., Mail Rates*, 6 C. A. B. 595, 602), but the magic word "tentative" or "temporary" did not appear in the order.

Inc., Mail Rates, 6 C. A. B. 407 (route operated 27 months before proceeding begun); *Pioneer Air Lines Inc., Mail Rates*, 8 C. A. B. 175 (route operated 20 days before proceeding begun).

The Board tried to justify this result on the ground of necessity. "Obviously when a new operation is commenced the question of mail compensation for that operation from its commencement must be decided" (81-82). Of course some procedure for affording the airline full compensation must exist. But it is equally obvious, however, that such a procedure does exist in new route cases, without conjuring up some special power to set rates prior to the time when a petition is filed. All the airline need do, to get full relief, is to file a petition when it starts operations. Indeed, it can petition for a rate even before it has begun to operate.* The Board's attempt to distinguish the new route cases on the ground of supposed necessity is utterly unsound.

The Board then noted that new route cases involve "no question of the retroactive revision of a final rate, since no rate at all was in effect for the new routes" (82, footnote 32). Recently it recognized that this position was too broad, and that it makes no difference that "no rate at all was in

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* See, *e.g.*, *Mid-Continent Airlines, Inc.—Mail Rate for Route No. 48*, 2 C. A. B. 392; *Northwest Airlines, Inc.—Mail Rate Proceeding for Route No. 45*, 2 C. A. B. 827; *Trans-Texas Airways*, Order No. E-900 (Oct. 20, 1947); *Colonial Airlines, Inc., Bermuda Services Mail Rates*, Order No. E-1153 (Jan. 26, 1948); *Piedmont Aviation, Inc.*, Order No. E-1277 (Mar. 9, 1948). A "permanent" rate can be—and has been—fixed even before operations have begun. See, *e.g.*, *Continental Air Lines, Inc.—Mail Rates for Route No. 43*, 1 C. A. A. 182, 189; *Pan American Airways Co. (of Delaware)—Mail Rates*, 1 C. A. A. 220, 258. More recently, only a temporary rate has been established when operations have not yet started. See, *e.g.*, *Braniff Airways, Inc.*, Order No. E-966 (Nov. 10, 1947).

effect for the new routes.'" * Moreover, the Act draws no distinction between the Board's *power* to fix a new rate by "retroactive revision of a final rate" and its *power* to fix a new rate where no such revision is involved. In one case, the carrier is made whole by retroactively increasing its compensation from an inadequate amount to a fair one; in the other, the increase is from another inadequate amount —zero—to the same fair rate.

Indeed, the Act does not talk about "final" rates at all. There is no period during which a rate necessarily will be "final" in the sense of being certain to remain in effect unchanged. Unlike the situation under the Railway Mail Pay Act and the Air Mail Act, under which a rate could not be reexamined for six months, there is no period during which the Board's mail rates are frozen and incapable of being changed. For the Act permits a new rate proceeding to be instituted at any time.

Thus, on March 1 the Board may fix a prospective rate, based on evidence taken months before, to take effect on March 2 or some future date. Anyone is free to start a new proceeding on March 2 to effect a change in that rate.

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* In *Alaska Airlines, Inc.*, Order No. E-1885 (Aug. 13, 1948), a carrier was operating star routes and receiving mail pay under contracts with the Postmaster General. On September 4, 1945, it filed a petition to have the Board fix rates. Later it amended the petition to ask that rates be fixed as of January 1, 1943. By analogy to the "new route" cases, the Board held that it had power to grant such retrospective relief. "The fact that in this case the carrier received some compensation, while in the new route cases there was no compensation, is not determinative of the real issue. The important point is that in neither case was there a previously fixed rate for the required service in accordance with the standards of Section 406" (p. 5). Because the "carrier waited such a long time to file its petition" it imposed the burden of proof of inadequacy on it (p. 6).

While that proceeding is pending, and until the Board makes a new order, mail compensation will be paid on the basis of the prospective rate. Even the Board admits, however, that it has power in the new proceeding to fix a different rate which will be retrospectively effective as of March 2. In that event the accounts between the Post Office and the airline will be adjusted back to March 2. Thus the prospective rate fixed on March 1 will never have been "final" in the sense of being immune from revision for any period of time.

Once a mail rate is fixed, therefore, it is "final" only in the sense that while it persists unchanged, it controls the action of the parties. In practice, that "finality" will continue if the Board is held to have the power to revise rates retrospectively back of the filing date of a petition. Few prospective rates will require such retroactive change. Rates will be revised retroactively only in appropriate cases of need, when the Board's prediction is shown to have been substantially wide of the mark. A rate order will therefore be no more and no less "final" than it is today, when concededly its supposed "finality" can be destroyed by filing a petition the day after its issuance.

Apart from that, the Board has actually undertaken revision of what it is pleased to call "final" rate orders.

B. The "Nunc Pro Tunc" Petition Device

In May 1942 the Armed Forces took over many of the air carriers' planes, and severe restrictions on service were imposed. To alleviate the resulting hardship, the Board issued two "general memoranda" to all airlines, which are set forth in full in Appendix C, *infra*. In the first, the Board, calling attention to its "*policy* of not making rates effective prior to the institution of a proceeding" (pp. C1-

C7, *infra*), suggested that it might institute a new rate proceeding on June 1, 1942, for the benefit of carriers having no such proceeding pending. The second memorandum of June 3, 1942, stated:

> "The Board will not initiate new rate proceedings as of June 1, 1942, as was stated in the Board's previous memorandum. Consequently, it will be necessary for any carrier which does not now have a rate proceeding pending but which wishes its rates to be subject to review by the Board for the period beginning June 1, 1942, to file a petition under Section 406 of the Act requesting such review. *The Board will accept any such petition filed within the next two weeks as being dated June 1, 1942, if the carrier concerned so desires.*"

Perhaps the Board thought that in this fashion it could pay lip service to its "policy" while avoiding prejudice to any carrier which had withheld a petition in the hope that the Board would start a proceeding itself. But if the Board lacked *power* to make a rate retrospectively effective as of a date earlier than the filing of a petition, of course it could not acquire it by allowing a petition to be filed *nunc pro tunc* that earlier date. That is true no matter how equitable the carrier's claim for relief would be. See, e.g., *Credit Co. Ltd.* v. *Arkansas Central Ry. Co.*, 128 U. S. 258, 261; *The Bayonne*, 159 U. S. 687, 692-693; *Gagnon* v. *U. S.*, 193 U. S. 451; *Conboy* v. *First Nat. Bank of Jersey City*, 203 U. S. 141, 145; *Old Nick Williams Co.* v. *U. S.*, 215 U. S. 541, 544. Thus the Board actually invited carriers to file petitions asking for retroactive relief which it now says it was powerless to grant.

In *United Air Lines Transport Corp.—Mail Rate Proceeding*, 3 C. A. B. 289, a petition to revise a rate had been

filed on December 26, 1941. On December 15, 1941, one of the carrier's schedules had been discontinued by the Post Office Department. This caused a reduction in its total mail compensation. In January 1942 the carrier asked that its petition be amended so as to ask an adjustment of the rate as of December 15, 1941. The Board did not want the carrier's total mail compensation reduced. Hence it allowed the amendment and then adjusted the rate on the route upwards as of December 15 (p. 292). To be sure, the carrier's total mail compensation was not "substantially" affected, but the fact remains that the Board actually increased the rate as of a date before the petition was actually filed, thus exercising power which it now claims did not exist.

C. Retroactive "Reopening" of "Final" Rate Orders

In one of its earliest rate cases, the Board retroactively increased a rate, long after it had become "final", without paying even lip service to its "general policy."

In June 1939 certain transatlantic mail rates were established, effective May 20, 1939. *Pan American Airways Co. (of Delaware)—Mail Rates*, 1 C. A. A. 220. The order set excess rates for loads over 1,600 pounds, "provided such trip shall have been completed at least as far as Foynes, Ireland or Lisbon, Portugal" (p. 258). It was very clear that excess rates were not allowed for mail carried only as far as the Azores (pp. 257, 258). Eight months later the Board "reopened" the proceeding on its own motion "to determine whether the rate of compensation being paid . . . for the transportation between the United States and . . . the Azores" was fair "and in case such rate should not be found to be fair and reasonable,

to fix and determine the fair and reasonable rate" therefor. *Pan American Airways Co. (of Delaware)—Transatlantic Mail Rates*, 1 C. A. A. 650. It found that the existing rate was unfair. "The fact that the volume of mail between the United States and the Azores is nominal in no way alters the fact that petitioner is entitled to a fair and reasonable rate of compensation for the service rendered in transporting such mails" (p. 652). Thereupon it "amended" its original order, retroactively as of May 20, 1939, to authorize excess rates on mail carried to the Azores (p. 654). Thus, it clearly revised the rate previously fixed for carrying mail to the Azores, retroactively as of a date 8 months before it reopened the proceeding.

Conversely, in *Pan American Airways, Inc., Latin-American Rate Case*, 3 C. A. B. 657, 6 C. A. B. 85, the Board set a final mail rate of 17.83¢ per airplane mile beginning September 1, 1942. Then the Board discovered it had given the carrier too much. By an order of February 28, 1944, the proceeding was "reopened" and the rate "placed under general review" (6 C. A. B., at p. 92).* Then by an

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* The carrier had previously filed a petition to reopen the proceeding. It had been granted on November 25, 1942, but only "with respect to certain limited issues," and the proceeding had not been reopened with respect to the rate in question. The order of February 28, 1944 (Serial No. 2326), recited "that review and possible revision of the rate of compensation effective from and after September 1, 1942 . . . is necessary" and that "review and revision of the rate previously fixed in this proceeding . . . is not within the scope of the issues now pending before the Board pursuant to its order of November 25, 1942, reopening this proceeding," and expressly ordered that the proceeding be "reopened for the purpose of rehearing, reargument and reconsideration with respect to the rate of compensation to be paid Pan American Airways, Inc. for the transportation of mail by aircraft on the Latin American routes from and after September 1, 1942. . . ."

order of July 17, 1944, the Board reduced the rate to 13.32¢ per airplane mile, effective September 1, *1942*.*

If the Board has no power to revise rates retroactively in a new proceeding, manifestly it cannot create that power by the transparent device of calling the new proceeding a "reopening" of the old one, for "the subsequent proceeding was, in effect, a new proceeding which by reason of its character invoked an authority not possessed" (*U. S.* v. *Mayer*, 235 U. S. 55, 70). See, *e.g.*, *Delaware, Lackawanna & Western Rd. Co.* v. *Rellstab*, 276 U. S. 1, 4-5; *Realty Acceptance Corp.* v. *Montgomery*, 284 U. S. 547, 549, 552; *In re Metropolitan Trust Co.*, 218 U. S. 312, 320. Hence these decisions necessarily recognized that the Board has power to change a rate retroactively as of a time antedating the proceeding instituted to effect that change.

D. The "System" Cases

1. *Western Air Lines, Inc.—Mail Rate for Routes Nos. 13, 19, and 52*, 4 C. A. B. 441, involved an airline which originally had only two routes, on which "final" rates were in effect before 1941. On *June* 12, 1941 it began mail service over a new route. In *December* 1941 it petitioned the Board for an order fixing rates for its entire system of three routes. Later it moved to withdraw that petition and

* Below it was sought to sustain this action by reference to §1005(d) of the Act (49 U. S. C. §645(d)), which says: "Except as otherwise provided in this Act, the [Board] is empowered to suspend or modify its orders upon such notice and in such manner as it shall deem proper." Of course, if §1005(d) applied it would equally confer power on the Board in this case to "modify" its order fixing TWA's mail pay. But the fact remains that §1005(d) is expressly made subordinate to all other provisions of the Act, including of course §406(a)(1). The Board's power to act retroactively was necessarily derived from §406(a)(1).

asked to have a rate fixed only for the new route. The Board denied that motion because it thought the rates "should be considered and determined upon a system basis" and that "the rates of compensation payable to respondent on all of its routes should, in so far as feasible, be subject to review and determination during the period" of operations over the new route (p. 442).

Concluding that "a review of respondent's need for mail compensation subsequent to *June* 12, 1941, is in order" (p. 444), the Board reviewed operations over all three routes from that date. It decided that the "mail compensation already paid respondent" on its two old routes "was adequate to meet all of its need" (p. 444). Because those rates "adequately compensated respondent for the services rendered over its entire system" it felt "no revision of such rates is necessary" (p. 445).*

Referring to its action in retroactively reviewing the fairness of the old rates during the six months before filing of the petition, the Board said (p. 444):

> "This, it should be emphasized, arises out of the unusual circumstances surrounding this case, where even though no proceeding was pending, a review of respondent's mail compensation was necessitated by the operation of a route for which no rate of mail

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* Similar action was taken where final rates were previously in effect for all routes. *Transcontinental & Western Air, Inc., Mail Rates*, 4 C. A. B. 139, 143. Rates were in effect for all of TWA's routes prior to 1941. On *March* 13, 1941, TWA petitioned for a new rate for just one route. On *August* 13, 1941, the Board commenced a proceeding to set new rates for all other routes of TWA, consolidating it with TWA's petition. The Board reviewed the rates on all routes from *March* 13, 1941 as "under the present circumstances the Board deems it necessary to review the operations of petitioner as a whole" but found that no revision was necessary.

compensation had been fixed. In the absence of like unusual circumstances the Board will adhere to its policy not to review rates prior to the institution of a proceeding by petition or order."

Actually the new route did not "necessitate" the Board's action at all. The Board is able to fix rates on a "system" or over-all basis, rather than for each route, because "the Act does not *require* the maintenance of the route concept."* But the Act does not require the "system" basis of rate-making either. The Board has recognized that "we may fix a rate for a single route if such a review indicates the necessity therefor" (*Transcontinental & Western Air, Inc., Mail Rates*, 4 C. A. B. 139, 143), and has done just that several times.** Thus retroactive revision of the previous rates on the old routes in a system is not at all mandatory merely because a new route is begun.***

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* *Inland Air Lines, Inc.—Mail Rates for Routes Nos. 28 and 35*, 3 C. A. B. 491, 492. See also, *Eastern Air Lines, Inc., Mail Rate Proceedings*, 3 C. A. B. 733, 740; *Pennsylvania-Central Airlines Corp., Mail Rates*, 4 C. A. B. 22, 25.

** See, *e.g., Mid-Continent Airlines, Inc.—Mail Rate for Route No. 48*, 2 C. A. B. 392, 393; *Pan American Airways, Inc., Latin-American & Miami-Leopoldville Services, Mail Rates*, Order No. E-738, July 24, 1947, p. 12. Indeed, in certain cases the Board regards itself as constitutionally obligated to fix a rate for a "segregated" route rather than the whole system. *Pacific Alaska Airways, Inc., et al., Alaska Mail Rates*, 6 C. A. B. 61, 68.

*** Unquestionably the Board must take into consideration the airline's revenue from other sources when fixing the amount of compensation to be paid for a new route. But the airline must be paid some compensation for the additional service on that route. *Pan American Airways Co. (of Delaware)—Transatlantic Mail Rates*, 1 C. A. A. 650, 652. The "rate of compensation" cannot be less than the reasonable value of that service, based on *quantum meruit* principles. *Pan American Airways Co. (of Delaware)—Mail Rates*, 1 C. A. A. 220, 252.

If the Act confers no power to reduce the excessive rates at which an airline has been paid on certain routes, because those rates are "final," the Board cannot accomplish that result indirectly when the airline later begins a new route. Yet that is what it did in the *Western* case. Nominally it left the old rates on the system unchanged, and gave the airline nothing for carrying mail over the new route. Realistically, it reduced the compensation on the system retroactively back of the date of the petition, since the airline received no more mail pay although it rendered more mail service.

The Board now says that the circumstances in the *Western* case were quite different from those here, and neither "the grounding of planes" nor "labor difficulties" are "particularly unusual" (82-83, and footnote 33). Of course there is nothing at all unusual about opening a new route. But the argument completely misses the point. Section 406(a)(1) does not give the Board special power where a carrier adds a new route to its system, or where "unusual" circumstances arise. Its language is completely general. Certainly it creates no hierarchy of "unusual" circumstances, drawing fine-spun distinctions between one "unusual" situation and another. If the Board lacks power to make a "retroactive revision of a fixed rate" on old routes, it cannot usurp that power just because a new route has been inaugurated and it usually likes to set a rate for an entire system.

2. In the *Western* case the old rate was nominally left undisturbed. Quite recently the Board modified an old rate in terms as well as in fact. A carrier operated two old routes, under a rate of 21.61 cents per airplane mile. *Colonial Airlines, Inc., Mail Rate*, 7 C. A. B. 415. On April

15, 1946, it started two new routes. In December 1946 it filed a rate petition. The Board fixed a lower temporary rate (20 cents per airplane mile) on *all four* routes, retroactively to April 15, 1946. *Colonial Airlines, Inc.*, Order No. E-408 (Apr. 1, 1947).*

3. Recently the Board struggled to reconcile the decision herein with its holdings in the "system" cases. An airline at first operated only one route, on which a final rate was in effect. *Northeast Airlines, Inc., Mail Rate—Route No. 27*, 4 C. A. B. 181, 194. On *May* 1, 1945, it began a second route. On May 14, 1945, it petitioned for a rate on that new route alone. On *June* 20 1945, the Board began a proceeding to fix a rate for the "system," and consolidated the proceedings. It reviewed the facts back to May 1, 1945, and fixed the compensation for the system "for the period beginning May 1, 1945" at a lump sum, "equal to 29.36 cents per airplane mile flown" (*Northeast Airlines, Inc., Mail Rates*, Order No. E-1230 [Feb. 26, 1948] order p. 2). Since that rate did "not provide an *upward* adjustment of mail rates on the old Route No. 27 for the period prior to June 20, 1945, when proceedings were initiated with respect to that route" the case was thought by the Board to present "no problem of retroactivity within the principle of the TWA" case (opinion, pp. 35-36).

This carries hair-splitting to the nth degree. First the Board reads into §406(a)(1) a limitation forbidding rates

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* Later the Board proposed an increase to 50 cents per airplane mile temporarily, stating that "the permanent rate . . . fixed shall be retroactively effective to *April 15, 1946.*" Order No. E-1263 (Mar. 4, 1948), p. 5. Evidently the Board realized belatedly that it was doing precisely what it had held, in this case, it could not do, for when it put the increase into effect, it said that the "final rate" would be "retroactive to such date as the Board shall then determine". Order No. E-1340 (Apr. 1, 1948), p. 4.

to be retroactively revised earlier than the time when the new proceeding begins. Until that time, rates are conclusively presumed to be frozen at a fair amount. Next it engrafts on the limitation an exception which enables it to unfreeze those rates to effect a retroactive revision in the "system" cases. Then it reads into that exception another one which permits the revision to be made downward, but not upward. Such mental gymnastics indicate that something is radically wrong with the Board's basic interpretation of the Act.

E. Significance of the Board's Action

Judged by its actions, the Board regards §406(a)(1) as providing that it is:

> "empowered and directed . . . to make such rates effective from such date as it shall determine to be proper, but only if that date does not antedate the date when the Board takes action upon its own initiative or when such a petition is filed, unless (a) the previous rates has expressly been called a 'tentative' or 'temporary' rate, or (b) the rate is being established for a new route, or (c) the Board permits the petition to be filed or amended *nunc pro tunc* some earlier date, or (d) the Board decides to 'reopen' an earlier proceeding and issue an 'amended' or 'revised' order, or (e) the carrier begins a new route and the Board desires (although it is not required) to adjust compensation retroactively on a system basis, but in that event it may make the adjusted rate retroactive only if it is lower than the previous rate."

This hodgepodge of rarefied and meaningless distinctions is what Congress is now supposed to have intended by the simple, clear words of §406(a)(1)!

Until its decision below the Board cautiously but repeatedly exercised the power now disclaimed. This administrative interpretation is added proof that there is nothing "ambiguous" about §406(a)(1). But if the Act mysteriously became ambiguous after ten years, the Board's original and long-standing interpretation would be decisive.

"An agency may not finally decide the limits of its statutory power. That is a judicial function" (*Social Security Board* v. *Nierotko*, 327 U. S. 358, 369). Where a statute is ambiguous, however, its interpretation by administrative agencies goes "far to remove doubt as to its meaning if any existed" (*First National Bank* v. *Missouri*, 263 U. S. 640, 658), and is always "entitled to great weight" (*Boutell* v. *Walling*, 327 U. S. 463, 471). For applications of this principle in mail pay cases, see *U. S.* v. *Alabama Great Southern Rd. Co.*, 142 U. S. 615, 621; *Grand Trunk Western Ry. Co.* v. *U. S.*, 252 U. S. 112, 121; *Luckenbach Steamship Co.* v. *U. S.*, 280 U. S. 173, 182. "The practice has peculiar weight when"—as here—"it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new" (*Norwegian Nitrogen Products Co.* v. *U. S.*, 288 U. S. 294, 315; quoted in *U. S.* v. *American Trucking Assn. Inc.*, 310 U. S. 534, 549). See also, *Great Northern Ry. Co.* v. *U. S.*, 315 U. S. 262, 275; *Fleming* v. *Mohawk Wrecking & Lumber Co.*, 331 U. S. 111, 116.

We submit that §406(a)(1) is perfectly plain, but if its clear words can be tortured into "ambiguity", the Board's previous interpretation has pointed the proper way to resolve any doubt on that score.

APPENDIX C

Civil Aeronautics Board's Memoranda of May 22 and June 3, 1942

May 22, 1942

Memorandum to the President of Each Domestic Air Carrier:

The Board has been considering what action should be taken by it with respect to the mail rates of air carriers (both those carriers which now have mail rate cases pending and those which do not) in the light of the new service pattern necessary under the recent transfer of planes to the Military. Attached is a statement of general principles designed to provide a basis for action in these circumstances.

The Board feels that the course of mail rate cases will be clarified and expedited if the Board could have in advance such criticism, modification or amplification of these suggestions as the carriers deem warranted or desirable.

Will you, therefore, please transmit twelve copies of any comment of your company to the Board by May 29, 1942. The question of oral presentation of views is reserved for consideration in the light of subsequent developments.

A copy of this memorandum is being sent to all counsel for the carriers.

L. Welch Pogue
L. Welch Pogue
Chairman

Attachment

Statement of General Principles to Govern Mail Rate Cases in the Light of the New Service Pattern

1. Having in mind the restrictions and changes in operation which will result from the delivery of planes to the Military and the operation of still further planes for the Military under contract, it will be necessary to review the mail rates of all air carriers affected thereby for the purpose of revising them in the light of the change in operations. This necessity for review applies to all air carriers affected by the change whether their rates are presently the subject of a rate proceeding or not.

2. It is desirable that, in so far as possible, for procedural purposes in connection with mail rate cases, the date of the changeover to the new service pattern be regarded as having occurred on the same date for all carriers and that such uniform date be the last day of a month. For this purpose May 31, 1942 is suggested.

3. Because of the uncertainties inherent in the present situation and the period of time which will undoubtedly be required to adjust to the new service pattern, it is not feasible to fix fair and reasonable rates for the future on the information presently available or which will be available until the process of adjustment has been substantially completed. Therefore, all rates effective on and after the date of the changeover to the new service pattern should be temporary in character, and should be subject to review and adjustment as to such period as experience may show the necessity for adjustment after a reasonable period of time. At the same time it is considered desirable in the case of all

carriers who now have rate proceedings pending to fix as rapidly as possible a final rate to be effective for all periods under review up to the date of the changeover to the new service pattern.

4. For the purposes of accomplishing the above objectives, it is proposed in all pending rate cases of carriers affected by the new service pattern, including those in which show cause orders have already been issued, to fix a rate which will be final for all past periods under review down to May 31, 1942, and temporary for the period thereafter. With respect to all carriers who do not now have a rate proceeding pending, it is proposed, in view of the Board's policy of not making rates effective prior to the institution of a proceeding, to issue an order instituting a proceeding to fix and determine the fair and reasonable rates for each such carrier from and after the date of the changeover to the new service pattern. It is the intention that this order will bring into issue the rate presently being paid such carrier and make such rate for the period subsequent to June 1, 1942 subject to review and adjustment after sufficient experience has been accumulated.

5. After sufficient experience has been accumulated under the new service pattern and operations and expenses of the carriers have become somewhat stabilized, it is proposed to issue in all proceedings a show cause order setting forth a tentative final rate, upon the general principles hereinafter set out, for the period beginning on the date of the changeover to the new service pattern. Procedure will then follow in accordance with Rule 11 of the Board's Rules of Practice and a final rate will be fixed for the period then under review.

6. It is contemplated, however, that in any case where the carrier can show financial distress due to the fact that its total revenues, including both non-mail of all kind and mail, furnish it with insufficient income to support its operations, the carrier may apply for adjustment of its temporary rate to afford it relief from such distress prior to the fixing of a final rate for the period.

7. The carriers' expenses should be brought to a level consistent with the scope of the operations which can be expected to result from the combined commercial and military operations. This principle must be qualified, however, by recognizing that: (a) It can not be expected that the carriers will be able to reduce expenses in the full proportion in which their level of operations is reduced; (b) they should maintain such organizations as will enable them to be prepared to deal promptly and efficiently with any new obligations which may be imposed upon them by military requirements; and (c) the carriers will not be able to effect immediate reductions in expenses to the extent which may ultimately be appropriate.

8. Where all operations at a point have been discontinued, the expenses formerly incurred at such point should not be considered in the mail rate unless it appears that the carrier is bound by a non-cancelable contract for such expenses and receives no other reimbursement of such expenses, or unless it appears that certain expenses are necessary for protection or maintenance of facilities at such point. Notice of cancelation of some contracts and "adjustment payments" for cancelation may be necessary.

9. The profit element of mail rates should be fixed without substantial reference to stimulus for development of

commercial revenues and traffic, and should not undertake to compensate the carriers for any lack of profit under the contracts with the Military, but should be fixed to provide an incentive for keeping expenses during the war to a minimum compatible with safe and efficient service.

10. Consideration will be given to the possibility of establishing standards for total operating expenses, or for certain categories of expense, as a criterion of economy of operation.

11. The Board will require such information concerning the carrier's revenues and expenses incident to its operations for the Military as may be necessary to enable the Board to give appropriate consideration to such revenues and expenses in fixing mail rates in these cases.

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Memorandum to the President of Each Domestic Air Carrier:

On May 22, 1942 the Board submitted to you a statement of general principles designed to provide a basis for action in mail rate cases in the light of the new service pattern necessary under the recent transfer of planes to the Military. An opportunity was given the carriers to present written comments to the Board thereon, and comments have now been received from a number of carriers.

In view of the substantial differences of opinion among the carriers expressed in their comments, the Board has decided to withdraw the suggestions contained in its earlier memorandum. In lieu thereof, the Board will follow the procedure outlined hereinafter.

The Board will not initiate new rate proceedings as of June 1, 1942, as was stated in the Board's previous memorandum. Consequently, it will be necessary for any carrier which does not now have a rate proceeding pending but which wishes its rates to be subject to review by the Board for the period beginning June 1, 1942 to file a petition under section 406 of the Act requesting such review. The Board will accept any such petition filed within the next two weeks as being dated June 1, 1942 if the carrier concerned so desires. In the event such a petition is filed, the Board, after sufficient experience has been accumulated under the new service pattern and operations and expenses of the carriers have become somewhat stabilized, will issue in such proceeding a show-cause order setting forth a proposed rate. Procedure will then follow in accordance with Rule 11 of the Board's Rules of Practice and a final rate will be fixed both for the past and future periods.

In all pending rate cases of carriers affected by the new service pattern, including those in which show-cause orders have already been issued, the Board will proceed in accordance with its usual procedure to fix a final rate both for the period prior and subsequent to June 1, 1942. Such final rate will be based primarily upon evidence concerning the past operations of the carrier. It is recognized that the forecasting of the future under existing circumstances is extremely difficult, if not impossible. It is, therefore, assumed that any evidence submitted concerning the future period will deal, so far as possible, with general principles and probable trends except where specific commitments have already been made or specific facts are already determined. The rates fixed in the pending proceedings will be final so far as these proceedings are concerned, and, if

the carrier concerned desires any adjustment in this rate in the future, it will be necessary for it to file a petition in the normal way.

The Board recognizes that in special instances unusually expeditious treatment of rate proceedings will be necessary, and it will do its utmost to provide such treatment in those cases.

A copy of this memorandum is being sent to all counsel for the carriers.

Civil Aeronautics Board

June 3, 1942